ALCOA

Alcoa

Warrick Operations
Highway 66
PO Box 10
Newburgh, IN 47629-0010 USA

OFFICIAL COMMENT

MaryAnn Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Ave.
MC 65-45
Indianapolis, Indiana 46204-2251

Subject: Third Notice of Comment on Antidegradation Rule

Dear Ms. Stevens:

The Indiana Department of Environmental Management ("IDEM") published a third notice draft rule concerning Antidegradation Standards and Implementation Standards (Proposed Rule) on December 9th, 2011 and requested that comments be provided to IDEM by December 31, 2011.

The Proposed Rule contains a number of revisions to the current Indiana water quality standards rules that Alcoa Inc. ("Alcoa") believes will significantly and adversely affect Alcoa's three facilities within the state. Alcoa is very concerned with the Proposed Rule as written because the Proposed Rule will: (1) impose unnecessary and unreasonable burdens and restraints on Alcoa's facilities when making even minor modifications to our operations; (2) decrease operational flexibility; (3) impose significant additional administrative expense and burden in processing more frequent NPDES permit modifications; (4) impose ultimate prohibitions on new and increased discharges; and (5) result in unnecessarily more stringent permit effluent limits.

In short, Alcoa's key concerns are:

1. A clear and concise trigger for the applicability of the antidegradation rule.

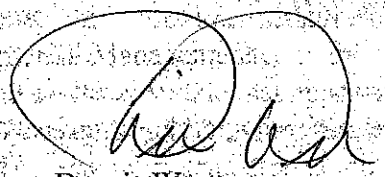
2. The variance mechanism should be applied to all variances including but not limited to 316(a), 316(b), and mercury.

3. A cumulative cap that is overly restrictive.

We cannot emphasize enough the adverse impact the Proposed Rule will have on Alcoa's operations within the state. Given the current economic environment, coupled with the exodus of our industrial base to other lower-cost countries, this type of regulation is just another obstacle in our ability to remain globally-competitive.

We appreciate the opportunity to provide these comments and IDEM's considered review of same.

Sincerely



Dennis Wene
Environmental Engineering Superintendent
Alcoa Inc.- Warrick Operations

COMMENTS ON IDEM'S PROPOSED RULES CONCERNING ANTIDEGRADATION STANDARDS

I. INTRODUCTION.

On December 9, 2011, the Indiana Department of Environmental Management ("IDEM") published a third notice draft rule concerning antidegradation standards and implementation procedures ("Proposed Rule"). The notice indicated that comments must be provided to IDEM by December 30, 2011.

Due to the short comment period that is available these comments will focus on 2 areas:

A. **The Antidegradation Trigger**

B. **Variances**

C. **The Cumulative Cap**

II. THE ANTIDEGRADATION TRIGGER

The proposed rule states that a "proposed new or increased loading of a regulated pollutant to surface waters of the state from a deliberate activity" is subject to an antidegradation review. The exception for HQW discusses "processes that are covered by an existing applicable permit" such as operational variability, adding shifts etc. Our concern is that there is too much ambiguity in this area. We feel that the antidegradation trigger should be "for a new or increased permit limit". The reason is that as an industrial facility we often need to modify equipment, make changes, or even add different types of "production lines" to meet changing customer demand. We have a certain supply capacity at the front end of the plant but how we manufacture our aluminum may change.

Example from recent events at our facility: Can sheet in the domestic market is slowly decreasing so we are always looking at opportunities to increase our presence in new products or areas. We had an opportunity to enter a new market, lithographic sheet with our existing product (aluminum sheet) but require a different innovative production line. This new line will have a wastewater stream that will go to our current wastewater treatment plant but we will still have a slightly increased level of aluminum in our discharge. We will still easily meet our current NPDES permit but this activity, depending on "agency interpretation" may be subject to antidegradation review. Remember, we are still well within out permit limits, but we may have more ambiguity in our capital planning process and our ability to meet market demand and possibly miss a business opportunity, again depending on "agency interpretation". There are other new and innovative ideas such as changes within our casting house using new technology etc that also could be interpreted as a "proposed new" activity but we not need a new permit limit, but rather a simple permit modification to state what we are doing and how we are doing it.

Another example is in the water treatment chemical additives. Our current NPDES permit has zinc as a monitored effluent parameter. Zinc phosphates are often used as a corrosion inhibitor but under the proposed rule, any changes to the water treatment additive would require some sort

of an antidegradation demonstration even though a small increase would still be within permitted limits.
The issue is the vagueness in which this is written and interpreted could create problems going forward. Without the appropriate trigger, our facility could be placed at a disadvantage with neighboring states who have a antidegradation trigger as previously described:

Ohio – For existing sources, any re-issuance or modification of a national pollutant discharge elimination system permit that, if approved, would result in..The increase in **the mass discharge limit** attributable to the activity

Kentucky - The activities identified in this subparagraph shall not be subject to the antidegradation implementation procedures ... **The renewal of a KPDES permit that does not authorize pollutant loading to the receiving stream in excess of that previously authorized**

Illinois - The Agency must assess any proposed increase in pollutant loading that **necessitates a new, renewed or modified NPDES permit** or any activity requiring a CWA Section 401 certification to determine compliance with this Section.

Iowa - A regulated activity shall not be considered to result in degradation, if:
A permit for an existing facility does not propose less stringent permit limits or increased treatment plant design capacity; or

Antidegradation review can be time-consuming and expensive. Such review also can introduce a substantial element of uncertainty into business planning and prediction as to what the outcome will be. Therefore, the Proposed Rule also should contain **(1) an applicability provision that uses a bright line trigger that necessitates a new or modified NPDES permit; and (2) a provision pertaining to the time for IDEM's rejection or approval of exemption applications.** Those in the regulated community should be informed as quickly as possible whether IDEM accepts or rejects an exemption application, and need the certainty of knowing that there is a clear time period by which they can expect such a determination.

III. PARTIES WHO HAVE RECEIVED A VARIANCE SHOULD NOT BE REQUIRED TO UNDERGO ANTIDEGRADATION REVIEW.

In addition, the Proposed Rule should be revised to provide that antidegradation review is not required for agency-approved variances. All variance applications must include a review of both the types of technology capable of treating the pollutant of concern and the social and economic costs of installing and operating each type of technology. This review is very similar to the technology review and demonstration of social or economic importance that is required for antidegradation review.

In fact, the United States Environmental Protection Agency ("U.S. EPA") recommends that States use the same process for reviewing social and economic impacts for variances and antidegradation review. *See* Interim Economic Guidance for Water Quality Standards Workbook, EPA 823/B-95-002 (March 1, 1995). Thus, if IDEM has granted a variance to a discharger, it makes sense that the discharger should not also need to complete an

antidegradation demonstration. A CWA § 316(a) demonstration affirmatively satisfies antidegradation requirements; thus, no additional review beyond the demonstration that the party already has obtained the variance should be required.

IV. SPECIFIC COMMENTS ON PROPOSED RULE'S DEMINIMIS/CUMULATIVE CAP PROVISIONS.

The Proposed Rule includes de minimis/cumulative cap provisions for high quality waters that are significantly different and greatly more stringent than from the current provisions in the implementation procedures for the Great Lakes system, 327 IAC 5-2-11.3 ("current rule"). The current rule defines the de minimis/cumulative cap based upon unused loading capacity and total loading capacity.

Specifically, under the current rule if as a result of a deliberate activity, a discharger requests a new permit limit or modified permit limit, and the increased limit (as mass) is less than 10 percent of the unused loading capacity and at least 10 percent of the total loading capacity ("TLC") remains unused after the increase, then the increase is considered a de minimis lowering of water quality. Thus, the activity and modified or new permit limit is not subject to the antidegradation demonstration requirements.

The current rule establishes a clear threshold based on the capacity that, cumulatively, ever could be allocated to effluent mass increases as 10 percent of TLC has to remain unused. That is, as multiple requests or multiple dischargers request small increases to discharge limits, the cumulative cap is:

90% TLC – Background Level = Cumulative Effluent Cap

As the TLC is based upon water quality criterion and the applicable stream design flow, the mass to remain unused is constant unless effluent load or background load changes dramatically.

In contrast to the current rule, the Proposed Rule defines the de minimis/cumulative cap based on only unused loading capacity. As in the current rule, for high quality waters the de minimis increase to a limit (or to a new limit) has to be less than or equal to 10 percent of the existing unused loading capacity, determined at the time of the specific proposed new or increased loading of the pollutant of concern. However, the " Benchmark of 90% of unused loading capacity is too restrictive.

IDEM has not presented data or information to show that the current de minimis/cumulative cap provisions are not satisfactory for managing antidegradation standard requirements with respect to minor increases to permit limits. In fact, the application of the cumulative cap and the definition of that cap in the current rule is appropriate and justifiable.

The de minimis allowance of 10 percent of unused loading capacity should be established as the default allowance, and the Proposed Rule should clarify that simple loading capacity calculations will be sufficient to demonstrate that a discharger qualifies under the de minimis provisions.

This is problematic especially for metals in receiving streams that have elevated levels of total suspended solids. The current test methods used for detection of metals often involves total

metals and the lab method requiring acid digestion and then metal extraction which overstates metal concentrations significantly. These total suspended solids (dirt particles) have trace metals that are bound in the particle and are not biologically available. In fact data that the agency would use to make a determination would suggest that the metal load in the Ohio River is so high that the river is sterile. This is obviously not the case as there is a great deal of fish in the river as noted in our recent 316B report submitted to the agency. So having this type of a strict "Benchmark" would essentially state that no storm water would be permitted to enter a great number of receiving streams including the Ohio River so all new discharge permits would have to go through the stringent antidegradation demonstration to discharge into a receiving stream that is clearly not impacted. Based on this possibility, has the agency even determined if there are concerns associated with the "Benchmark" set at 90%. It would be incumbent upon the agency that prior to promulgating such a restrictive rule, that the agency actually review the potential complication as this rule could severely restrict any new business growth and unable to actually issue the current permits especially with the trigger as currently written.

We believe that the cap should be returned to the original cap as written into the Great Lakes Rule.

III. CONCLUSION

We have many significant concerns with the Proposed Rule and that it makes Indiana the strictest state in terms of antidegradation in the region. Of primary importance is triggering mechanism in which antidegradation begins and the associated cumulative cap. Current business in Indiana needs to be able to adapt to the market place and make changes without excessive regulatory interference and delays. If a new permit is required for new or expanded business then this is another regulatory hurdle but one that all states require businesses to go through. While we need to be protective of our state waters, we really don't need to place ourselves and our state at a competitive disadvantage in there trying times.

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Warrick Operations
State Route 66
Newburgh, IN 47630

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Mary Ann Stevens
Rules Development Branch
Office of Legal Council
Indiana Dept of Environmental Mgmt
100 N. Senate Av.
MC 65-45
Indianapolis IN 46204-2251

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ALCOA

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TO: IDEM
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MSC: 0000000547
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Alcoa

Warrick Operations
Highway 66
PO Box 10
Newburgh, IN 47629-0010 USA

OFFICIAL COMMENT

December 16th, 2011

CERTIFIED MAIL 7009 0080 0001 9091 1601

Indiana Department of Environmental Management
Office of Commissioner
100 North Senate Avenue, Rm IGCN 1301
Indianapolis, Indiana 46204

RE: Request for Time Extension for Comments on Anitdegradation Rule

Dear Mr. Easterly,

Alcoa-Warrick Operations is requesting an extension for the comment period associated with the third notice draft of the antidegradation rule. The draft was issued just prior to the holidays and Alcoa-Warrick Operations typically slows down and most everyone is on vacation at that time of the year. This year was no different. We request an additional 30 days to ensure that the correct data and comments can be submitted to the agency to ensure that the agency has an opportunity to receive and evaluate all of the information necessary for this rule.

There are minor changes in some of the language that has a great impact on the interpretation and application of the rule. These items need the proper attention and evaluation and that is why we are requesting additional time.

If you have any questions, please feel free to contact me.

Sincerely,

Denny Wene
Environmental Engineering Superintendent
Alcoa Warrick Operations
812-853-4625

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
We Protect Hoosiers and Our Environment.

Mitchell E. Daniels Jr.
Governor

Thomas W. Easterly
Commissioner

100 North Senate Avenue
Indianapolis, Indiana 46204
(317) 232-8603
Toll Free (800) 451-6027
www.idem.IN.gov

December 16, 2011

Mr. Denny Wene 860-E1
Environmental Engineering Superintendent
Alcoa Warrick Operations
PO Box 10
Newburgh, IN 47629

Dear Mr. Wene:

RE: Request for 30-day extension of Antidegradation third notice comment period

In response to your request for a 30-day time extension of the third notice comment period for the proposed antidegradation rule, IDEM Commissioner Tom Easterly, the Office of Water Quality's Deputy Commissioner Martha Clark Mettler, and I have considered your request and respectfully denied it for the following reasons:

- The rule language contained in the antideg proposed rule posted in the Indiana Register on December 7, 2011, (AKA the preliminarily adopted rule) was preliminarily adopted by the Water Pollution Control Board (WPCB) on September 14, 2011.

- The proposed rule language has been available to Alcoa since August 31, 2011, when the September WPCB packet, including the antideg rule documents, was sent to the WPCB members. The antideg workgroup stakeholders also received the board packet rule documents from MaryAnn Stevens in an e-mail sent on August 31, 2011, and, soon thereafter, the rule documents were posted on the IDEM web site for public perusal.

- The only new information contained in the Indiana Register's December 7, 2011, posting of the antideg third notice of comment period is IDEM's response to comments received at the preliminary adoption hearings held on July 27 and September 14, 2011. Alcoa did not comment at these hearings.

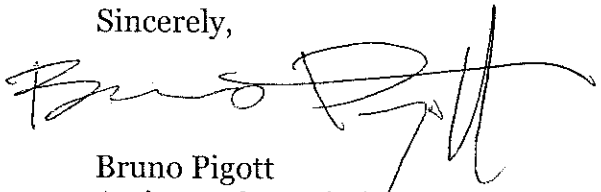
- As noted in the response to comments, the only rule language change IDEM is currently proposing to make before presenting the rule to the WPCB for consideration of final adoption is to change the September 14- adopted proposed rule language definition of "Endangered or threatened species" to align with the original definition of "Threatened and endangered species" that was contained in earlier drafts of the rule. The original definition included consideration of species on the Indiana lists, which must be considered by the commissioner when reviewing an antidegradation demonstration for a project that proposes a new or increased loading of a regulated pollutant to a surface water of the state from a deliberate activity subject to the Clean Water Act.

- The administrative rulemaking statute requires that a third notice of comment period be 21 days long. IDEM has extended the antideg third notice comment period to 23 days to account for the fact that many people get both Christmas day and Christmas eve as holidays. The two additional days allow for the same number of working days that would have been available if the holidays had not occurred.

The antidegradation rulemaking, LSA Document #08-764, began in 2008 with stakeholder meetings predating the initiation of the formal rulemaking steps. IDEM believes the stakeholders and the public have been kept well informed of every step in the process that has brought us to our present position of third notice of comment period.

Mr. Wene, thank you again for your request. I appreciate your participation in the workgroup process and your efforts as a WPCB member to shepherd the rule to its present stage, as well as your interest in ensuring adequate public input during this process. Should you have any other questions or need further information, please do not hesitate to contact me at 317/233-2550.

Sincerely,



Bruno Pigott
Assistant Commissioner
Office of Water Quality
Indiana Department of Environmental Management

IDEM

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

We Protect Hoosiers and Our Environment.

Mitchell E. Daniels Jr.
Governor

Thomas W. Easterly
Commissioner

100 North Senate Avenue
Indianapolis, Indiana 46204
(317) 232-8603
Toll Free (800) 451-6027
www.idem.IN.gov

December 22, 2011

Mr. Stan Pinegar
Mr. Patrick Bennett
Indiana Energy Association
1600 One American Square
Box 82065
Indianapolis, Indiana 46282

Dear Messrs. Pinegar and Bennett:

RE: Request for 14-day extension of Antidegradation third notice comment period

In response to your request for a 14-day time extension of the third notice comment period for the proposed antidegradation rule, IDEM Commissioner Tom Easterly, the Office of Water Quality's Deputy Commissioner Martha Clark Mettler, and I have considered your request and respectfully denied it for the following reasons:

- The rule language contained in the antideg proposed rule posted in the Indiana Register on December 7, 2011, (AKA the preliminarily adopted rule) was preliminarily adopted by the Water Pollution Control Board (WPCB) on September 14, 2011.

- The proposed rule language has been available since August 31, 2011, when the September WPCB packet, including the antideg rule documents, was sent to the WPCB members. The antideg workgroup stakeholders also received the board packet rule documents from MaryAnn Stevens in an e-mail sent on August 31, 2011, and, soon thereafter, the rule documents were posted on the IDEM web site for public perusal.

- The only new information contained in the Indiana Register's December 7, 2011, posting of the antideg third notice of comment period is IDEM's response to comments received at the preliminary adoption hearings held on July 27 and September 14, 2011.

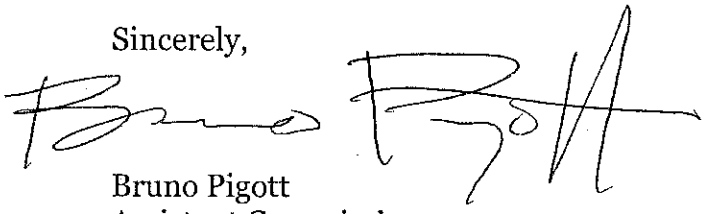
- As noted in the response to comments, the only rule language change IDEM is currently proposing to make before presenting the rule to the WPCB for consideration of final adoption is to change the September 14- adopted proposed rule language definition of "Endangered or threatened species" to align with the original definition of "Threatened and endangered species" that was contained in earlier drafts of the rule. The original definition included consideration of species on the Indiana lists, which must be considered by the commissioner when reviewing an antidegradation demonstration for a project that proposes a new or increased loading of a regulated pollutant to a surface water of the state from a deliberate activity subject to the Clean Water Act.

- The administrative rulemaking statute requires that a third notice of comment period be 21 days long. IDEM has extended the antideg third notice comment period to 23 days to account for the fact that many people get both Christmas day and Christmas eve as holidays. The two additional days allow for the same number of working days that would have been available if the holidays had not occurred.

The antidegradation rulemaking, LSA Document #08-764, began in 2008 with stakeholder meetings predating the initiation of the formal rulemaking steps. IDEM believes the stakeholders and the public have been kept well informed of every step in the process that has brought us to our present position of third notice of comment period.

Mr. Pinegar and Mr. Bennett, thank you again for your request. I appreciate your participation in the workgroup process as well as your interest in ensuring adequate public input during this process. Should you have any other questions or need further information, please do not hesitate to contact me at 317/233-2550.

Sincerely,



Bruno Pigott
Assistant Commissioner
Office of Water Quality
Indiana Department of Environmental Management

STEVENS, MARY ANN

From: Andes, Fredric [Fredric.Andes@btlaw.com]
Sent: Friday, December 30, 2011 4:08 PM
To: STEVENS, MARY ANN
Subject: Comments on LSA Document #08-764 (Antidegradation)
Attachments: indantidegcomments123011.pdf; indantidegsuggestedchanges123011.pdf

Attached are comments from Barnes & Thornburg on IDEM's third-notice proposed rule on antidegradation. Please feel free to call or e-mail if you have any questions. Thank you very much.

Fredric P. Andes, Esq.
Partner, Barnes & Thornburg LLP
Suite 4400
One N. Wacker Drive
Chicago, Illinois 60606-2833
Phone: 312/214-8310
Fax: 312/759-5646
Cell: 773/354-3100
E-Mail: fandes@btlaw.com

COMMENTS ON THIRD NOTICE ANTIDEGRADATION PROPOSAL

- PERMIT LIMIT TRIGGER

The proposed rule requires an antideg review when there is a new or increased loading, even if there is no change in permit limits associated with the change. This is inconsistent with the antideg rules of numerous other States that have been approved by USEPA. Those rules specify that in order for antideg review to be triggered, there must be a request for a new or increased permit limit. That "bright line" test makes sense. It allows all stakeholders to be clear as to when an antideg review will be required – and will not be required. Without that test, there will be significant confusion. Industrial and municipal facilities make frequent changes to their operations, and the discharge levels will increase and decrease as a result, sometimes on a daily basis. Most of the time, these facilities discharge at levels well below their permit limits, and the frequent increases and decreases do not change that status – discharge levels stay in compliance with limits. The operators understand that if a particular change will require a new or higher permit limit, then they will have to apply for a permit modification, and at the same time, they will need to assess whether the increase is significant enough to require antideg review.

But under the proposed rule, the operators also have to assess the possibility of triggering antideg review whenever they make any change in their operations that leads the discharge levels to be slightly higher than they were immediately before the change, even if the discharge goes from 50% of the permit limit to 51% of the permit limit. This will create significant uncertainty, and will cause dischargers to sometimes "guess wrong" and then be charged later with not complying with antideg requirements. Moreover, this substantial expansion of antideg review is not required by Federal law – there is no requirement in the CWA or EPA's rules that prohibits use of a permit limit trigger – and is unnecessary to protect the environment. As long as the discharger is meeting their current technology-based and water quality-based permit limits, they are operating at levels that have been determined to protect water quality, and there is no basis to force them to reduce further. The Board should fix this problem by adding a permit limit trigger into the proposed rule. A suggested language change to address this issue is attached to these comments.

- CUMULATIVE CAP

The proposed rule contains a "cumulative cap" as part of its definition of de minimis increases, which will not be required to undergo antideg review. As a general matter, increases that use less than 10% of the total loading capacity of the waterbody are considered to be de minimis, and we agree with that test. It is based on EPA recommendations that were provided to Indiana and other Great Lakes States when EPA adopted the Great Lakes Initiative – at that time, EPA clearly stated that as to non-BCCs, increases of less than 10% are not significant. At the same time, EPA recommended that a "cumulative cap" of 10% be required – in other words, that once less than 10% of the total loading capacity remains unused, all increases must undergo antideg review. So if a

series of increases have occurred on a particular waterbody, and now there is only 9% of the loading capacity that remains unused, all increases past that point are required to have a review, no matter how small those individual increases are. This ensures that the pollutant levels will stay in compliance with standards, and that water quality will therefore be protected. This 10% cap was adopted by Indiana for use in the Great Lakes Basin, and has been in the rules for that area of the State since 1997.

Now, the proposed rule makes a radical change in the current cumulative cap. Instead of requiring that reviews are triggered after the "10% unused" level is triggered, the proposal requires reviews when a "90% unused" level is triggered. Thus, once one discharger has used 9.9999% of the unused loading capacity for the stream, every single discharger that wants to make an increase, no matter how small, will have to perform an antideg review, and faces the risk that their increase request will be denied, even though almost 90% of the available loading capacity of the stream remains unused. There is no environmental reason to mandate that new requirement, which will also place significant restrictions on economic growth. Moreover, there is no basis in Federal law for EPA, or anyone else, to require this new "90% rule." Nowhere in the CWA or EPA's rules does it dictate what the State's cumulative cap level must be – or that there be such a cap at all. Given that EPA's own recommendation in the Great Lakes initiative was for a 10% cap, which has been part of the rules for the Great Lakes Basin for 14 years, Indiana should retain that requirement, and apply it statewide. Indiana should not adopt the 90% rule, which is the most stringent cap provided by any State antideg rules. Attached are suggested rule changes, which propose that the 90% test be changed to a 50% test, which should still be fully protective of water quality while reducing the adverse impact of the rules on economic growth. Any test adopted by the Board in the final rules should consider both of those factors, and should be accompanied by a full explanation of why a change from the current 10% test is both justified and necessary. No such explanation has been provided to date.

- EXCEPTIONS TO REVIEW

Section 2-1.3-4(b) of the proposed rule describes a series of situations in which the current antideg rules do not require a review – they are exceptions. There are good reasons for these exceptions. In some cases, the environmental impact of the increased discharge is very minor – for some, the impact is actually positive. In other cases, the action causing the increase is clearly of significant social/economic benefit or has already undergone a careful review by IDEM. There is simply no reason why antideg review should be required in these situations, and review will serve little purpose. Moreover, similar exceptions have been adopted by other States and approved by USEPA.

There is no legal basis, under the CWA or EPA's rules, to take these exceptions away, but that is exactly what the proposed rule does. These situations that were formerly exempted from antideg review now have to go through a review – it appears to be a somewhat less extensive review than is required for other situations under the rule, but it is a review, and it will take time and money to prepare an antideg analysis. Then, there is the uncertainty of not knowing whether the demonstration will be approved. This

placing of unnecessary hurdles makes no sense, when the actions covered are ones that we want dischargers to take. For example, one of the former exceptions covers increases that occur due to municipal efforts to control sewer overflows – efforts that are actually required under Federal and State law. By taking away the antideg exception, the proposed rules could actually prevent a discharger from taking actions that are mandated by the CWA itself. The exceptions were appropriate, and the rule should be modified to restore those exceptions. Suggested rule revisions to make this change are attached.

- DE MINIMIS REVIEW WHEN NO NUMERIC CRITERION

The proposed rule requires antideg review for any regulated pollutant. This means that even if a particular pollutant is not covered by a technology-based requirement or a numeric water quality criterion, it can still be subjected to antideg review when there is an increase. In fact, it appears that due to the way in which the rule was constructed, EVERY increase is subject to antideg review if the pollutant at issue is not subject to a numeric water quality criterion. This makes no sense. If a criterion exists, then the rules allow for de minimis increases without antideg review. The definition of de minimis uses the concept of "10% of total loading capacity." And the "total loading capacity" is determined through a calculation that uses the numeric criterion. So if there is no numeric criterion, then there is no way to define de minimis, and any increase, no matter how small, must undergo a full antideg review. As with other provisions noted above, there is no legal or technical reason for that provision in the proposed rule. If a de minimis provision is appropriate – and it is – then it should be available for any non-BCC pollutant, regardless of whether there is a numeric water quality criterion for that pollutant. To fix this problem, the rule should be amended to provide that if there is no criterion, then IDEM should determine an appropriate water quality value to use instead in determining "total loading capacity," relying on appropriate studies and data. A suggested rule change to implement this recommendation is attached to these comments.

- CHANGES IN BASELINE LOADING CAPACITY

The proposed rule establishes a "baseline loading capacity," which is used to determine when an increase goes beyond the "90% rule" discussed above. This baseline is established at the time of the first request for an increased loading for that waterbody, and apparently, the baseline can never change. But this does not recognize that the amount of loading capacity available can change over time. For instance, if a facility shuts down that was discharging to that waterbody, the amount of capacity consumed by that discharge would not become available and "unused." The rule needs to be changed to specify that if there is a permanent reduction in discharges to the waterbody, then IDEM should adjust the baseline capacity to reflect that change. Suggested language to implement this concept is attached to these comments.

SUGGESTED CHANGES IN ANTIDEGRATION PROPOSAL

327 IAC 2-1.3-2 (53) "Total loading capacity", is expressed as a regulated pollutant mass loading rate per twenty-four (24) hour period, for the waterbody in the area where the water quality is proposed to be lowered, and means the product of the applicable water quality criterion multiplied by the sum of:
(A) the existing effluent flow;
(B) the proposed new or increased effluent flow; and
(C) either:
(i) the approved alternate mixing zone volume for Lake Michigan; or
(ii) the stream design flow.
If there is no applicable numeric water quality criterion, then the commissioner shall instead determine an appropriate water quality value for use in determining total loading capacity, based on consideration of relevant studies and data.

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327 IAC 2-1.3-4(c) For an HQW except an ONRW, a new or increased loading of a regulated pollutant resulting from the following is exempt from the antidegradation demonstration requirements included in section 5 of this rule:

(1) A new or increased loading of a non-BCC that is a demonstrated de minimis lowering of water quality as shown by the submission of sufficient information that allows the commissioner to verify the de minimis as determined according to the following:

(A) Calculation considerations according to the following:

(i) The proposed net increase in the loading of a regulated pollutant is less than or equal to ten percent (10%) of the available loading capacity determined at the time of the specific proposed new or increased loading of the regulated pollutant. The available loading capacity shall be established at the time of each request for a new or increased loading of a regulated pollutant.

(ii) The benchmark available loading capacity is equal to fifty percent (50%) of the available loading capacity established at the time of the request for the initial increase in the loading of a regulated pollutant, except that if there is a subsequent, permanent decrease in discharges to that waterbody, the commissioner shall adjust the benchmark available loading capacity to reflect the corresponding increase in available loading capacity.

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327 IAC 2-1.3-5 (a) Any existing or proposed discharger seeking a new or increased discharge that requires a new or increased permit limit and that constitutes a significant lowering of water quality that is not exempt under section 4 of this rule must submit for consideration by the commissioner an antidegradation demonstration that justifies that the proposed new or increased discharge is necessary and

provides a social or economic benefit in the area of the discharge. Each antidegradation demonstration shall include the following basic information:

(1) The regulated pollutants proposed to be discharged.

(2) The estimated mass and concentration of all regulated pollutants proposed to be discharged.

(3) The receiving water or waters that would be affected by the new or increased discharge.

(4) The physical, biological, and chemical conditions of the receiving water or waters as determined by:

(i) chemical analysis;

(ii) biological analysis; or

(iii) both items (i) and (ii).

327 IAC 2-1.3-5 (b) An antidegradation demonstration shall not be required for the following beneficial activities that result in a new or increased discharge:

Deleted: that includes the basic information required under subsection (a) and the necessary information required under subsection (c) shall be submitted

(1) A change in loading of a regulated pollutant due solely to implementation of:

(A) enforceable municipal or industrial controls on wet weather flows, including combined sewer overflows; or

(B) an enforceable individual NPDES permit for storm water associated with industrial activity;

when there is no net increase in the quantity and concentration of the regulated pollutant discharged to the same ten (10) digit watershed.

(2) A new or increased loading of a regulated pollutant due to one (1) or more of the following:

(A) A response action under CERCLA, as defined in IC 13-11-2-24, as amended.

(B) A corrective action under RCRA, as amended.

(C) An action utilizing federal or state authorities with regulations to alleviate a release into the environment of hazardous substances, pollutants, or contaminants that may pose an imminent or existing and substantial danger to public health or welfare, including one (1) or more of the following:

(i) An underground storage tank (UST) corrective action under IC 13-23-13.

(ii) A remediation of petroleum releases under IC 13-24-1.

(iii) A voluntary remediation under IC 13-25-5.

(iv) An abatement or correction of any polluted condition under IC 13-18-7.

(3) A new or increased discharge of noncontact cooling water that will not do the following:

(A) Increase the temperature of the receiving water or waters outside of the designated mixing zone, where applicable.

(B) Increase the loading of BCCs.

(C) Require numeric water quality-based effluent limitations (WQBELs) for toxic substances or WET as determined under 327 IAC 5-2-11.5.

(4) A new or increased loading of an approved non-BCC water treatment additive.

(5) A change in loading of a regulated pollutant:

(A) where there is a voluntary, simultaneous, enforceable decrease in the actual loading of the regulated pollutant from sources contributing to the same ten (10) digit watershed; and

(B) with the result that there is a net decrease in the loading of the regulated pollutant to the same ten (10) digit watershed.

(6) A new or increased loading of a regulated pollutant from a sanitary wastewater treatment plant constructed or expanded to alleviate a public health concern, for example, a connection of existing residences currently on septic systems.

BARNES & THORNBURG LLP

11 South Meridian Street
Indianapolis, IN 46204-3535 U.S.A.
(317) 236-1313
Fax (317) 231-7433

www.btlaw.com

Michael T. Scanlon
(317) 231-7387
mscanlon@btlaw.com

December 30, 2011

OFFICIAL COMMENT

Via Hand Delivery
LSA Document #08-764 (Antidegradation)
MaryAnn Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Avenue
MC 65-45
Indianapolis, IN 46204-2251

Re: Comments on LSA Document #08-764 (Antidegradation)

Dear Ms. Stevens:

On behalf of Indianapolis Power & Light Company ("IPL"), Barnes & Thornburg LLP is submitting the following comments as part of the third notice of public comment period for the Indiana Department of Environmental Management's ("IDEM") proposed antidegradation rule. The LSA document number for the proposed antidegradation rule is 08-764 and these comments are being submitted by the December 30, 2011 deadline identified in the third notice of public comment. IPL appreciates the opportunity to provide these comments.

1. **Applicability**

Proposed 327 IAC 2-1.3-1(b) and 327 IAC 2-1.3-5(a) apply the antidegradation implementation procedures to proposed new or increased loadings of a regulated pollutant to surface waters of the state from a deliberate activity subject to the Clean Water Act. IPL believes the applicability for the antidegradation rule, including the implementation demonstration, should be based on new or increased discharges that result in an increase in concentration or mass of a regulated pollutant that triggers the imposition of a new discharge limit or a modification to an existing discharge limit in a NPDES permit. As currently proposed, the regulation could be read to apply to any increase in the mass or concentration of a discharge of a regulated pollutant even if that increase either (a) is to the discharge of a regulated pollutant that currently is not subject to a discharge limit and the increase would not result in that regulated pollutant becoming subject to a discharge limit or (b) would be of a regulated pollutant already limited in a NPDES permit and the increase in the amount of the regulated pollutant discharged would exceed current discharge amounts but would not exceed permitted discharge limits in such current NPDES permit. Regarding the first situation, if the current discharge of a regulated pollutant is not subject to a discharge limit and the amount of that pollutant being discharged is increased to a level that also would not result in the imposition of a new or modified discharge limit, such discharge should be classified as de minimus and excluded from

the antidegradation requirements because it simply is too minor to be considered a significant lowering of water quality.

Regarding the second situation, if a company has a process and wanted to add an additional process of the same type as the current process and that addition would not require a modification to a discharge limit in its existing NPDES permit, would add to the amount of a regulated pollutant being discharged that already is limited in the permit, but the increased amount of the regulated pollutant added by the new process would not exceed the concentration and mass discharge limits already contained in a current NPDES permit for that regulated pollutant, it appears that an antidegradation demonstration could be required even though a modification of the discharge limit in the permit would not be required. Because discharge limits included in NPDES permits are based on the more stringent of the effluent limitation guidelines developed for specific industries and activities, water quality standards, and limits based on best professional judgment, IDEM already would have determined that the water body in question in this situation was capable of assimilating the amount of the regulated pollutant at issue in compliance with existing water quality standards and other requirements at a level consistent with the currently permitted mass and concentration limits. Therefore, requiring an antidegradation demonstration for such an increase when there will be no change to the discharge limit is unnecessary and unduly burdensome for both the regulated community and IDEM.

IPL understands and appreciates that the exclusions contained in the proposed 327 IAC 2-1.3-4(c)(2) address changes in existing operations due to operational variability, among other things. However, it does not appear this exclusion is sufficiently broad to overcome the failure to tie increases to changes in permit discharge limits or the addition of new permit discharge limits. Therefore, IPL proposes that 327 IAC 2-1.3-1(b) be revised to include the phrase "that requires a new or increased permit limit" between "to a proposed new or increased loading of a regulated pollutant to surface waters of the state" and "from a deliberate activity subject to the Clean Water Act" and that 327 IAC 2-1.3-5(a) be revised to include the phrase "that requires a new or increased permit limit and" between "Any person requesting a new or increased loading" and "that would cause a significant lowering of water quality". Without these revisions, IPL believes the regulated community could be required to expend unnecessary time and resources to prepare and submit antidegradation demonstrations for changes that otherwise would not require a new or modified NDPES permit discharge limit for the regulated pollutant in question.

2. Regulated pollutant and de minimus

Pursuant to proposed 327 IAC 2-1.3-1(b), the antidegradation implementation procedures apply to proposed new or increased loadings of a regulated pollutant "that will result in a significant lowering of water quality." Proposed 327 IAC 2-1.3-2(51) defines a "significant lowering of water quality" as an increase that is greater than "de minimus" and proposed 327 IAC 2-1.3-4(c)(1) explains what constitutes a de minimus lowering of water quality for high quality waters that are not Outstanding National Resource Waters. According to proposed 327 IAC 2-1.3-4(c)(1) and the definition of "total loading capacity" in proposed 327 IAC 2-1.3-2(53), a determination that an increase is de minimus only applies if the regulated pollutant at issue has a numeric water quality criterion.

According to IDEM's definition in proposed 327 IAC 2-1.3-2(44), a "regulated pollutant" includes pollutants that have a numeric water quality criterion as well as pollutants that do not have a numeric water quality criterion, such as pollutants associated with a narrative water quality criterion. Because the proposed antidegradation implementation procedures apply to any proposed new or increased loading of a regulated pollutant that is not de minimus and a numeric water quality criterion must apply to the regulated pollutant to determine if the increased discharge is de minimus, any new or increased loading of a regulated pollutant that does not have a numeric water quality criterion automatically would be subject to the antidegradation implementation procedures regardless of the actual magnitude of the increase unless it satisfies an exemption.

IPL agrees that a de minimus level should be established below which antidegradation demonstrations are not required. However, defining de minimus so it only applies to regulated pollutants that have a numeric water quality criterion will result in dischargers having to comply with the antidegradation implementation procedures regardless of the actual impact of the increased or new discharge when the regulated pollutant at issue does not have a numeric water quality criterion. This is particularly problematic because, as discussed in comment 1 above, the proposed antidegradation standard is not limited to proposed new or increased discharges that require a modification to or imposition of a new effluent discharge limit.

IPL recommends that the regulation identify a de minimus level for all regulated pollutants or provide an option for the discharger to demonstrate that its new or increased discharge will not significantly impact the water body. This is particularly important for pollutants that may only be associated with narrative water quality criteria. Alternatively, the definition of regulated pollutant could be revised to only include pollutants that have a numeric water quality criterion thereby allowing the proposed de minimus approach to apply to all regulated pollutants. Unless IDEM provides a de minimus option for all proposed new or increased discharges, the regulated community will be required to prepare and IDEM will be required to review antidegradation demonstrations even if the increased discharge will not significantly impact the water body just because the regulated pollutant at issue does not have a numeric water quality criterion.

3. **Cumulative cap**

IPL agrees that a cumulative cap on increased discharges should be imposed to create a minimum threshold below which all increases must be evaluated. However, IPL does not agree that 90% of the available loading capacity at the time of the initial increase is the appropriate threshold. First, the cumulative cap for non-BCCs in the current antidegradation standard for the Great Lakes portion of the state is 10% of the total loading capacity [327 IAC 5-2-11.3(b)(1)(B)(ii)(BB)] and IDEM has failed to provide any justification for increasing the cumulative cap for the Great Lakes portion of the state to 90% or for imposing a cumulative cap for the non-Great Lakes portion of the state that is different than the current 10% cap. Second, regardless of what cumulative cap is imposed, it is important to note that the cumulative cap provision applies to water bodies that already satisfy the applicable water quality criteria. Therefore, the cumulative cap that is imposed will not endanger the ability of these water bodies

to continue to comply with the water quality standards. To be consistent with the current regulations, IPL suggests that a cumulative cap of 10% of the available loading capacity be used in the proposed rule. Furthermore, if IDEM believes a 10% cumulative cap is not sufficiently protective, it must provide adequate justification for a different cumulative cap and allow the public and regulated community sufficient time to comment on that justification prior to finalizing this rule.

IPL also recommends that an option exist to re-determine the baseline available loading capacity if there has been a subsequent permanent decrease in discharges of a regulated pollutant to the water body. Over time, reductions in concentrations of regulated pollutants likely will occur due to increased controls from advances in wastewater treatment technologies and reductions in or eliminations of discharges due to water management practices, changes in processes and operations, and/or plant closures. Because the quality of water bodies will change over time and such changes will include improvements, freezing the time at which the benchmark available loading capacity is determined to the time of the first increase is not appropriate or justified particularly when such subsequent decreases are associated with permanent reductions.

4. **Noncontact cooling water, approved non-BCC water treatment additives, storm water discharges, increased loadings to accomplish a reduction in air pollutants, and certain other discharges for which some but not all antidegradation demonstration information must be submitted**

The proposed rule at 327 IAC 2-1.3-5(b)(3), (b)(4), (b)(1)(B), (d)(2), and (b)(2) identifies certain new or increased loadings for which the amount of information that must be submitted as part of the antidegradation demonstration is reduced but not eliminated. These new or increased loadings include certain noncontact cooling water discharges, discharges of IDEM approved non-BCC water treatment additives, discharges with enforceable individual NPDES permits for storm water associated with industrial activities, discharges associated reductions in air pollution, and discharges associated with remediations. IPL believes these increased loadings should be excluded from the antidegradation implementation requirements because they either have minimal impacts on the water body, already have been reviewed and approved by IDEM's Office of Water Quality (such as for water treatment additives), or clearly are associated with activities that will improve the environment. As such, requiring an antidegradation demonstration for these discharges, even a limited demonstration, is unnecessary and unduly burdensome. This is particularly true for noncontact cooling water discharges and discharges associated with remediation because to not exempt them from the demonstration requirements would be inconsistent with the approach taken by the majority of other Region 5 states.

Because antidegradation demonstrations require both time and resources to complete, new and existing businesses in other Region 5 states would have a competitive advantage over Indiana if the exemptions from the antidegradation requirements are not expanded. Therefore, IPL proposes that these new or increased loadings be deleted from proposed 327 IAC 2-1.3-5 and moved to the exclusions contained in proposed 327 IAC 2-1.3-4. In addition, IPL would like to note that other new or increased loadings identified in proposed 327 IAC 2-1.3-5(b) and (d)

also likely should be treated as exclusions from the rule and not subject to even the reduced antidegradation demonstration requirements in proposed 327 IAC 2-1.3-5. However, because those identified new or increased discharges are not potentially related to IPL's operations, IPL leaves it to other commentors to provide comments on whether those new or increased loadings also should be excluded from the antidegradation requirements.

5. **How much information is required to be included in an antidegradation demonstration**

Proposed 327 IAC 2-1.3-5 identifies the types of information that must be included in antidegradation demonstrations. However, the proposed rule is silent regarding the amount of documentation and specific information that must be included as part of a submission to adequately support an antidegradation demonstration. IPL understands IDEM's desire to postpone the development of guidance containing information regarding what it believes is necessary to support an antidegradation demonstration but without knowing this, it is impossible for the regulated community to determine if such information is appropriate and will not result in unduly burdensome requirements. Preparing information for each of the generic topics identified by IDEM for inclusion in antidegradation demonstrations could range from fairly basic documents to major studies. IDEM should provide the regulated community as well as the public with information regarding what it believes is necessary for a sufficient antidegradation demonstration before this rule is finalized to ensure the proposed rule and its economic impact can be adequately evaluated and commented upon. Finally, the detailed information regarding the amount and scope of information that must be included to satisfy each of the antidegradation demonstration topics identified in the proposed rule should be spelled out in the rule itself and not through guidance.

6. **IDEM's Fiscal Impact Statement**

Because IDEM has failed to identify the scope and amount of information that will need to be included to adequately support an antidegradation demonstration as discussed in comment 5 above, IDEM's economic analysis contained in the fiscal impact statement associated with this proposed rule must be questioned. IDEM's economic analysis is based on the estimated number of submissions which in turn is based on previous permit applications, the number of hours needed to complete an antidegradation demonstration, and the cost per hour to prepare an antidegradation demonstration.

As discussed in comment 1 above, IDEM should limit the applicability of the antidegradation rule to those new or increased discharges that require a new or modified permit discharge limit. Because the number used by IDEM in its fiscal impact statement for how many antidegradation demonstrations would need to be prepared is based on permit applications that have been submitted, apparently IDEM also believes this at least as it relates to calculating the proposed rule's economic impact. However, because the proposed rule is not limited to activities that trigger new or modified discharge limits, IDEM's estimate in the fiscal impact statement regarding the number of demonstrations that will need to be prepared each year is not supported by the information it presented.

Also, because IDEM has not provided any information regarding the amount and specificity of information necessary to constitute an adequate antidegradation demonstration, IDEM can not justify its claim that a full demonstration will require only 16 hours of work. IDEM states the 16 hour estimate is based on Iowa's antidegradation program but fails to state that IDEM's requirements will be the same as Iowa's. Therefore, IPL believes IDEM's 16 hour estimate likely is unrealistically low and certainly has not been supported by IDEM.

Finally, without knowing the amount and specificity of the information to be included in an antidegradation demonstration, claiming the hourly cost will be $100 to prepare the information is not supported. Depending on the magnitude of the information that must be included in an antidegradation demonstration and the extent of any studies that must be included (all of which have yet to be determined by IDEM), it is very likely that the costs per hour to prepare such documentation will exceed the $100 per hour estimate provided by IDEM.

Because the details necessary to determine the costs associated with an adequate antidegradation demonstration have not yet been developed by IDEM and the number of antidegradation demonstrations that will need to be completed are unknown given IDEM's failure to tie this requirement to increased discharges that require the imposition of a new or modified permit discharge limit, it is impossible to know what the actual fiscal impact of this rule will be. That being said, it is highly likely the fiscal impact will be far greater than IDEM's estimate in the fiscal impact statement for the reasons discussed above.

7. Mercury

The proposed antidegradation rule contains provisions for addressing new or increased discharges of mercury. However, Indiana already has a streamlined mercury variance procedure which provides a comprehensive method of addressing mercury discharge issues. IPL believes imposing the proposed antidegradation requirements in addition to the streamlined mercury variance mechanism is unnecessary and will prove to be unworkable. Therefore, IPL proposes that the antidegradation rule be revised to exclude new or increased discharges of mercury that are subject to a variance from the antidegradation requirements.

8. Variances in general

It is unclear whether the proposed antidegradation rule would apply to variances in general. If it will, IDEM should exclude variances from the antidegradation rule because all variances must be evaluated and approved by IDEM under separate requirements. Therefore, imposing antidegradation demonstrations on variances is unnecessary.

9. Tiers 2 and 2.9

The antidegradation standards for Tiers 2 and 2.9 in proposed 327 IAC 2-1.3-3(b) and (c) require the Commissioner to assure that the "highest statutory and regulatory requirements for all new and existing sources are applied" to a discharger if a significant lowering of water quality will be allowed. However, the proposed regulation is silent regarding how this will be done. To

the extent this provision would allow the Commissioner to impose requirements on a discharger that are based on requirements for dischargers in industrial categories that are different from the discharger's industrial category or have not been demonstrated to be applicable control technologies for the discharger in question, IDEM should be required to demonstrate that such controls are appropriate for the discharger in question prior to requiring the use of such controls. This provision should be revised to state that the highest statutory and regulatory requirements for all new and existing point sources to be considered are limited to those statutory and regulatory requirements that apply to point sources in the same industrial classification and are subject to the same effluent limit guidelines that apply to the activities and processes used by the discharger in question.

10. <u>De minimus increases in heat</u>

Proposed 327 IAC 2-1.3-4(c)(1)(B) identifies de minimus increases in heat to water bodies other than Lake Michigan as new or increased discharges the do not result in an increase in temperature outside a designated mixing zone and will not result in an increase in waste heat at an amount greater than the amount required to raise the temperature of the stream design flow of the receiving stream by 1 degree Fahrenheit. In some cases, neither the current NDPES permit nor the associated fact sheet identifies a designated mixing zone for heat. In all cases where a mixing zone has been allowed even if it has not been included in the current NPDES permit or the associated fact sheet, that mixing zone should be considered the designated mixing zone for purposes of this condition. Also, IDEM has not identified any basis for the 1 degree Fahrenheit limitation. 327 IAC 2-1-6(b)(4)(C) identifies a maximum of 5 degree Fahrenheit and 3 degree Fahrenheit increases above natural temperature for streams and lakes and reservoirs respectively as the water quality standard. IDEM should provide a justification for imposing a 1 degree Fahrenheit limitation as de minimus in place of some higher temperature increase for review and comment by the regulated community and the public prior to finalizing this proposed rule.

11. <u>Best available demonstrated control technology</u>

Proposed 327 IAC 2-1.3-2(3) defines best available demonstrated control technology (BADCT) and proposed 327 IAC 2-1.3-5(e)(1) states IDEM will establish accepted effluent limits based on BADCT. However, the proposed rule is silent regarding how IDEM will identify BADCT, how it will determine that the technology it identifies as BADCT "represents cost-effective treatment technology that is readily available", and what role the discharger will have in identifying and determining if such technology actually is cost effective and readily available for the discharge in question. Without such information, this provision of the proposed rule can not be evaluated to determine if it will impose unduly burdensome requirements or is reasonable. Furthermore, it is not possible to determine what costs will be associated with this provision thereby further rendering IDEM's fiscal impact analysis questionable. This information should be provided to the regulated community and the public for review and comment prior to finalizing the proposed rule.

12. Final determinations on antidegradation demonstrations

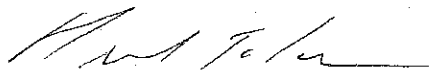
According to proposed 327 IAC 2-1.3-6(g), the Commissioner will issue a final determination on an antidegradation demonstration and, if approved, incorporate that final determination into a draft permit and fact sheet available for public comment. Because the final determination appears to be a final agency action, that determination will become subject to appeal when it is issued and prior to the issuance of a permit. Also, if the comments received on the draft permit result in changes to the final determination, then that determination will no longer be final and will need to be revised and reissued in final as part of the final permit. This can be resolved fairly simply by identifying the Commissioner's initial determination as a proposed determination and the final determination would be the determination issued as part of the final permit following comment. Should IDEM deny the antidegradation demonstration, that determination should be a final agency action subject to appeal. Furthermore, by requiring an antidegradation demonstration only when a new or modified discharge limit would be required, the linkage between the permit and the antidegradation demonstration would be clearer.

13. Definition of toxic substance

Proposed 327 IAC 2-1.3-2(54) contains a definition of toxic substance that is sufficiently broad to include any chemical, even if the concentration of the chemical actually being discharged is not toxic. Any chemical can be toxic depending upon its dose. By defining the term toxic substance without linkage to the dosage at which the chemical becomes toxic results in this definition becoming unworkable. This definition should be revised to recognize that a substance only becomes toxic and, thus, a toxic substance when the dosage is sufficient to create toxic effects.

If you have any questions, please contact Nysa Hogue at 317/261-5473 or nysa.hogue@aes.com.

Respectfully submitted,



Michael T. Scanlon, Esq.
Barnes & Thornburg LLP

cc: Nysa Hogue, Indianapolis Power & Light Company

Fax # 233-5710
2 Pages

citizens energy group™

2020 North Meridian St. | Indianapolis, IN | 46202

CitizensEnergyGroup.com

December 30, 2011

OFFICIAL COMMENT

LSA Document #08-764 (Antidegradation)
MaryAnn Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Avenue
MC 65-45
Indianapolis, IN 46204-2251

Re: IDEM Antidegradation Standards and Implementation Procedures Proposed Rule (LSA Document #08-764) as Publicly Noticed on December 9, 2011

Dear Ms. Mettler:

Citizens Energy Group, on behalf of Citizens Thermal, Citizens Water, and Citizens Gas (collectively, "Citizens"), as well as CWA Authority, Inc., is pleased to offer the following comments on the Proposed Rule referenced above.

Citizens supports the comments submitted by the Indiana Energy Association on behalf of the Indiana Utility Group. Specifically Citizens supports the following comment on the applicability of the proposed antidegradation implementation procedures:

Indiana's proposed implementation procedures do not limit antidegradation review to only actions requiring a new or modified NPDES permit subject to section 402 (NPDES) of the Clean Water Act. Instead, Section 1(b) of proposed 327 IAC 2-1.3 would apply the implementation procedures to any proposed deliberate activity subject to the Clean Water Act that would result in a new or increased loading of a regulated pollutant. However, the actual implementation procedures of Sections 4 and 5 of the Proposed Rule appear to be almost entirely based on the context of an NPDES discharger. Therefore, not only is the scope of applicability of the proposed implementation procedures vague, leaving open to question which activities would be subject to antidegradation review, but the Proposed Rule lacks meaningful implementation procedures for activities apart from those subject to NPDES permit

requirements.

IUG urges that the scope of applicability for the proposed antidegradation implementation procedures be stated at this time in terms of "any new or increased loading of a regulated pollutant to surface waters of the state from an activity requiring issuance of a new or modified NPDES permit that will result in a significant lowering of water quality."

In addition, CWA Authority, as the authority implementing the Industrial Pretreatment Permitting ("IPP") program in Indianapolis, has concerns with the practical mechanics behind the implementation of proposed 327 IAC 2-1.3-5(c) as it relates to IPP permit holders and the antidegradation analysis that should occur. We believe that the applicability of the draft rule is confusing for POTW's with an Industrial Pretreatment Program, as well as for the IPP permit holders. We request that IDEM provide guidance to IPP program authorities in the implementation of these provisions prior to final adoption of the rule.

Thank you for the opportunity to provide these comments. Should you have questions or wish to discuss, please don't hesitate to contact me at (317) 693-8716 or via e-mail at jhavard@citizensenergygroup.com.

Sincerely,

John E. Havard

John E. Havard, P.E.
Manager, Environmental Technical Programs

STEVENS, MARY ANN

From: Hyman, Jeffrey Bruce [jbhyman@indiana.edu]
Sent: Thursday, December 29, 2011 2:06 PM
STEVENS, MARY ANN
ject: 08-764 Antidegradation Comments from CLC and AGL
Attachments: CLC-AGL_ COMMENTS_3rd Notice 08-764 Antidegradation_12.29.11.pdf

Dear Ms. Stevens,

Please accept the attached comments on the 3rd-noticed draft antidegradation rule, submitted on behalf of Conservation Law Center and Alliance for the Great Lakes. A hard-copy will follow via the U.S. mail.

Please note that CLC and AGL are also signatories to another set of comments submitted on behalf of the environmental coalition.

Thanks. PLEASE PROVIDE A DOCUMENT RECEIPT for this electronic mail.

Jeff Hyman

Jeffrey B. Hyman, Ph.D., J.D.
Staff Attorney, Conservation Law Center
Adjunct Professor of Law, Indiana University Maurer School of Law

Bloomington, IN 47408
(812) 856-5737 (Direct Line)
994-5872 (Cell Phone)
jbhyman@indiana.edu
www.conservationlawcenter.org

OFFICIAL COMMENT

December 29, 2011

LSA Document #08-764 (Antidegradation)
MaryAnn Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Avenue
MC 65-45
Indianapolis, IN 46204-2251

OFFICIAL COMMENT

RE: COMMENTS ON THIRD NOTICE DRAFT INDIANA ANTIDEGRADATION RULE

Dear Ms. Stevens,

Thank you for this opportunity to comment on IDEM's third-notice draft antidegradation rule. The Conservation Law Center is a not-for-profit public interest law firm located in Bloomington, Indiana. With these comments we are also representing the interests of the Alliance for the Great Lakes, Inc., an environmental organization dedicated to the health of the Great Lakes, including Lake Michigan, and with members who will be directly affected, and potentially injured, by implementation of Indiana's antidegradation rule.

The language of at least three of the Section 5 exemptions – 327 IAC 2-1.3-5(b)(5), 5(d)(1), and 5(d)(2) – in the draft antidegradation implementation rule as preliminarily adopted by the Indiana Water Pollution Control Board is inconsistent with federal regulations and antidegradation policy. These three Section 5 exemptions allow a non-de minimis new or increased loading of pollutants, including BCCs, into a waterbody without a demonstration that the new or increased loading is socially or economically important or beneficial. These exemptions should be brought into alignment with federal requirements pursuant to the Clean Water Act.

Our comments reference two attached appendices. Appendix A provides text from the three Section 5 exemptions discussed here, along with the analogous exemptions in the existing Indiana antidegradation implementation rules, which will be replaced by the new rule. Appendix B provides an excerpt from the January 29, 2010 letter sent by EPA Region 5 to IDEM commenting on a substantially similar previous draft of the pollution trading exemptions.

BACKGROUND

I. The Tier 2 Antidegradation Standard in 40 CFR § 131.12(a)(2) and 40 CFR Part 132, Appendix E–Great Lakes Water Quality Initiative (GLWQI) Antidegradation Policy.

Federal antidegradation policy requires that for high quality waters – *i.e.*, where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water – the existing water quality must be maintained and protected "unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located." 40 CFR § 131.12(a)(2). This standard is repeated in the GLWQI, which states in relevant part as follows:

> I. Antidegradation Standard
> This antidegradation standard shall be applicable to any action or activity by any source, point or nonpoint, of pollutants that is anticipated to result in an increased loading of BCCs to surface waters of the Great Lakes System and for which independent regulatory authority exists requiring compliance with water quality standards. Pursuant to this standard:
>
> * * * * *
>
> B. Where, for any parameter, the quality of the waters exceed levels necessary to support the propagation of fish, shellfish, and wildlife and recreation in and on the waters, that water shall be considered high quality for that parameter consistent with the definition of high quality water found at section II.A of this appendix and that quality shall be maintained and protected unless the State or Tribe finds, after full satisfaction of intergovernmental coordination and public participation provisions of the State's or Tribe's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. . . . The State or Tribe shall utilize the Antidegradation Implementation Procedures adopted pursuant to the requirements of this regulation in determining if any lowering of water quality will be allowed[.]

II. Constraints on Exemptions from a Full Antidegradation Demonstration.

A. Exemptions from a Full Antidegradation Demonstration Must Be Justified by At Least One of Three Arguments.

An "exemption" from a full Tier 2 antidegradation demonstration for a new or increased loading of a pollutant, to be consistent with the perspectives of EPA and the courts, must be justified by at least one of the following arguments:

(1) the change in loading will result in a de minimis decrease in water quality in the receiving waterbody over the range of likely loadings – that is, the decline in water quality is not large enough to worry about;

(2) the state presents evidence that a procedure outside of the antidegradation implementation rule sufficiently substitutes for that part of the antidegradation demonstration that is omitted;

(3) the state presents evidence that all of the circumstances that would qualify for the exemption are likely to be socially or economically important (or beneficial).

B. Indiana's Antidegradation Rule Must Be "As Protective As" and "Consistent With" the GLWQI Guidance, 40 CFR Part 132, Which Sets Forth a Limited Set of Exemptions for a New or Increased Loading of a BCC Into Lake Michigan.

The GLWQI Guidance in 40 CFR Part 132 "identifies minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System to protect human health, aquatic life, and wildlife." 40 CFR § 132.1(a). Indiana's antidegradation program "do[es] not need to be identical to the Guidance in this part, but must contain provisions that are consistent with (*i.e.*, as protective as) the Guidance in this part. 40 CFR § 132.1(b). Also, Indiana "must adopt provisions consistent with the Guidance in this part applicable to waters in the Great Lakes System or be subject to EPA promulgation of its terms pursuant to this part," 40 CFR § 132.1(c), and Indiana "shall adopt requirements applicable to waters of the Great Lakes System for the purposes of sections 118, 301, 303, and 402 of the Clean Water Act that are consistent with . . . (6) The Antidegradation Policy in appendix E of this part." 40 CFR § 132.4(a)(6).

40 CFR Part 132, Appendix E contains a specific and limited set of exemptions from a full antidegradation demonstration for new or increased loadings of BCC's into the Great Lakes. These exemptions appear in four locations within App. E. The four locations are as follows (specific exemptions are italicized):

(1) In II.A., under the definition of "Significant Lowering of Water Quality":

> A significant lowering of water quality occurs when there is a new or increased loading of any BCC from any regulated existing or new facility, either point source or nonpoint source for which there is a control document or reviewable action, as a result of any activity including, but not limited to . . . .
>
> *Notwithstanding the above, changes in loadings of any BCC within the existing capacity and processes, and that are covered by the existing applicable control document, are not subject to an antidegradation review. These changes include, but are not limited to:*
>
> *(1) Normal operational variability;*

(2) Changes in intake water pollutants;
(3) Increasing the production hours of the facility, (e.g., adding a second shift); or
(4) Increasing the rate of production.

Also, excluded from an antidegradation review are new effluent limits based on improved monitoring data or new water quality criteria or values that are not a result of changes in pollutant loading.

(2) In II.D.1., under the discussion of high quality waters:

D. For high quality waters, the Director shall ensure that no action resulting in a lowering of water quality occurs unless an antidegradation demonstration has been completed pursuant to section III of this appendix and the information thus provided is determined by the Director pursuant to section IV of this appendix to adequately support the lowering of water quality.

1. The Director shall establish conditions in the control document applicable to the regulated facility that prohibit the regulated facility from undertaking any deliberate action, such that there would be an increase in the rate of mass loading of any BCC, unless an antidegradation demonstration is provided to the Director and approved pursuant to section IV of this appendix prior to commencement of the action. *Imposition of limits due to improved monitoring data or new water quality criteria or values, or changes in loadings of any BCC within the existing capacity and processes, and that are covered by the existing applicable control document, are not subject to an antidegradation review.*

(3) In II.F., under the heading "Exemptions":

F. Exemptions. Except as the Director may determine on a case-by-case basis that the application of these procedures is required to adequately protect water quality, or as the affected waterbody is an Outstanding National Resource Water as defined in section II.A of this appendix, the procedures in this part do not apply to:

1. Short-term, temporary (i.e., weeks or months) lowering of water quality;
2. Bypasses that are not prohibited at 40 CFR 122.41(m); and
3. Response actions pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, or similar Federal, State or Tribal authorities, undertaken to alleviate a release into the environment of hazardous substances, pollutants or contaminants which may pose an imminent and substantial danger to public health or welfare.

(4) In III.E., under the heading "Special Provision for Remedial Actions":

> *E. Special Provision for Remedial Actions. Entities proposing remedial actions pursuant to the CERCLA, as amended, corrective actions pursuant to the Resource Conservation and Recovery Act, as amended, or similar actions pursuant to other Federal or State environmental statutes may submit information to the Director that demonstrates that the action utilizes the most cost effective pollution prevention and treatment techniques available, and minimizes the necessary lowering of water quality, in lieu of the information required by sections III.B through III.D of this appendix.*

PROBLEMS WITH THE DRAFT RULE TRADING EXEMPTIONS

III. Because the Draft Section 5 Exemptions Apply to Discharges of BCCs, These Exemptions Make It Easier to Avoid the Requirement of a Full Antidegradation Demonstration Than Do the Exemptions in Part 132, App. E, and Thus the Indiana Draft Rule, as Applied to Lake Michigan, Is Less Stringent Than and Inconsistent With 40 CFR Part 132.

Draft Rule Sec. 5(b)(5) states as follows:

> (5) A change in loading of a regulated pollutant:
> (A) where there is a voluntary, simultaneous, enforceable decrease in the actual loading of the regulated pollutant from sources contributing to the same ten (10) digit watershed; and
> (B) with the result that there is a net decrease in the loading of the regulated pollutant to the same ten (10) digit watershed.

Draft Rule Sec. 5(d)(2) states as follows:

> (2) A new or increased loading of a regulated pollutant where:
> (A) the new or increased loading is necessary to accomplish a reduction in the release of one or more air pollutants; and
> (B) there will be an environmental improvement that will occur when the applicant demonstrates that the reduction in the loading of the air pollutant:
> (i) is necessary to meet a state or federal air quality standard or emission requirement; or
> (ii) will substantially reduce human exposure to hazardous air pollutants or other air pollutants that are subject to state or federal air quality standards.

1. In the draft rule, these exemptions apply to non-de minimis new or increased loadings of BCCs.

2. Because these exemptions are not included in Part 132 App. E, they are inconsistent with the federal requirements because they make it easier for a facility to discharge BCC's into a high quality water without a full antidegradation demonstration than does Part 132 App. E.

IV. Because the Section 5 Exemptions Apply to Discharges of BCCs, They Are Significantly Different Than the Analogous Exemptions in the Existing Antidegradation Rule, and IDEM Has Not Justified This Change.

1. The pollution trading exemptions in the existing Indiana antidegradation rule expressly do not apply to BCCs, whereas the draft exemptions at Sec. 5(b)(5), Sec. 5(d)(1), and Sec. 5(d)(2) do exempt discharges of BCCs from a full antidegradation demonstration. See Appendix A.

2. Applying the exemptions to BCCs is a significant change from the existing rule.

3. Why did IDEM make this significant change in these exemptions?

V. Trading Across Communities Within Watersheds Should Presumptively Require a Demonstration of Social or Economic Importance.

Draft Rule Sec. 5(b)(5) states as follows:

> (5) A change in loading of a regulated pollutant:
> (A) where there is a voluntary, simultaneous, enforceable decrease in the actual loading of the regulated pollutant from sources contributing to the same ten (10) digit watershed; and
> (B) with the result that there is a net decrease in the loading of the regulated pollutant to the same ten (10) digit watershed.

1. This exemption allows a significant increase in the loading of a pollutant in one community in exchange for a decreased loading of the pollutant in another community, without socio-economic review, so long as the two communities are in the same 10 digit HUC and there is a net decrease in the loading of the pollutant in the 10 digit HUC. (See also the Section 5(b)(1) exemption, which also allows watershed trading but is somewhat more narrowly tailored.)

2. The problem with this pollution trading scheme is that it does not meet any of the justifications set forth in section II.A. above. See also excerpt of EPA letter in Appendix B.

3. A 10 digit HUC almost certainly encompasses different communities as well as different tributaries and/or lakes. A typical example is shown in Figure 1 below, which shows the

boundaries of 10 digit HUCs overlaying a map of northwest Indiana. Figure 1 shows that Burns Harbor and Beverly Shores are contained within the same 10 digit HUC. Also, traveling south on I-65, the 10 digit HUC containing Orchard Grove also contains Cedar Lake, Lake of the Four Seasons, and Lake Dalecarlia.

4. The different communities located within a 10 digit HUC may have unique social or economic structures, values, and needs, and the different tributaries and lakes within a 10 digit HUC may be associated with different social or economic uses and values. How can IDEM presume that this is not true without an analysis of social and economic factors?

5. The antidegradation policy requires that the lowering of water quality be socially or economically important "in the area in which the water is located." 40 CFR 131.12(b). If the "area in which the water is located" can be smaller than the size of a 10 digit HUC, then it cannot be presumed without evidence that an increased loading of a pollutant in one "area" is socially or economically important simply because it is offset by a decreased loading in another "area," even though the two areas are located in the same 10 digit HUC. An analysis of the social and economic benefits and costs of such a trade would be required to answer the question of social and economic importance.

6. How can IDEM presume that an increased loading of a pollutant in one "area in which the water is located" is socially or economically important simply because it is offset by a decreased loading in another "area in which the water is located" just because the two "areas" occur within the same 10 digit HUC?

7. If the "area in which the water is located" cannot be smaller than the size of a 10 digit HUC, then one might expect, at least theoretically, that a pollution trade that results in a net decrease in the loading of the pollutant to the same 10 digit HUC may be socially or economically important. However, IDEM has never stated that "the area in which the water is located" is no smaller than a 10 digit HUC in all cases in which the trading exemptions would be applied, and such a statement does not appear to be justified.

8. Indiana has not offered publically any information or evidence showing that pollution trades at the spatial scale of a 10 digit HUC would produce a social or economic benefit "in the area in which the water is located." Indiana cannot presume that a pollution trade would be socially or economically important at the spatial scale of a 10 digit HUC (see Figure 1).

9. How will IDEM apply this pollution trading exemption to direct discharges into Lake Michigan? Theoretically at least, this exemption would allow a significant reduction in water quality in one shore area of the Lake in exchange for increased quality in another shore area of the Lake, regardless of whether those two Lake areas intermix, and without any consideration of the social or economic effects of such a tradeoff.

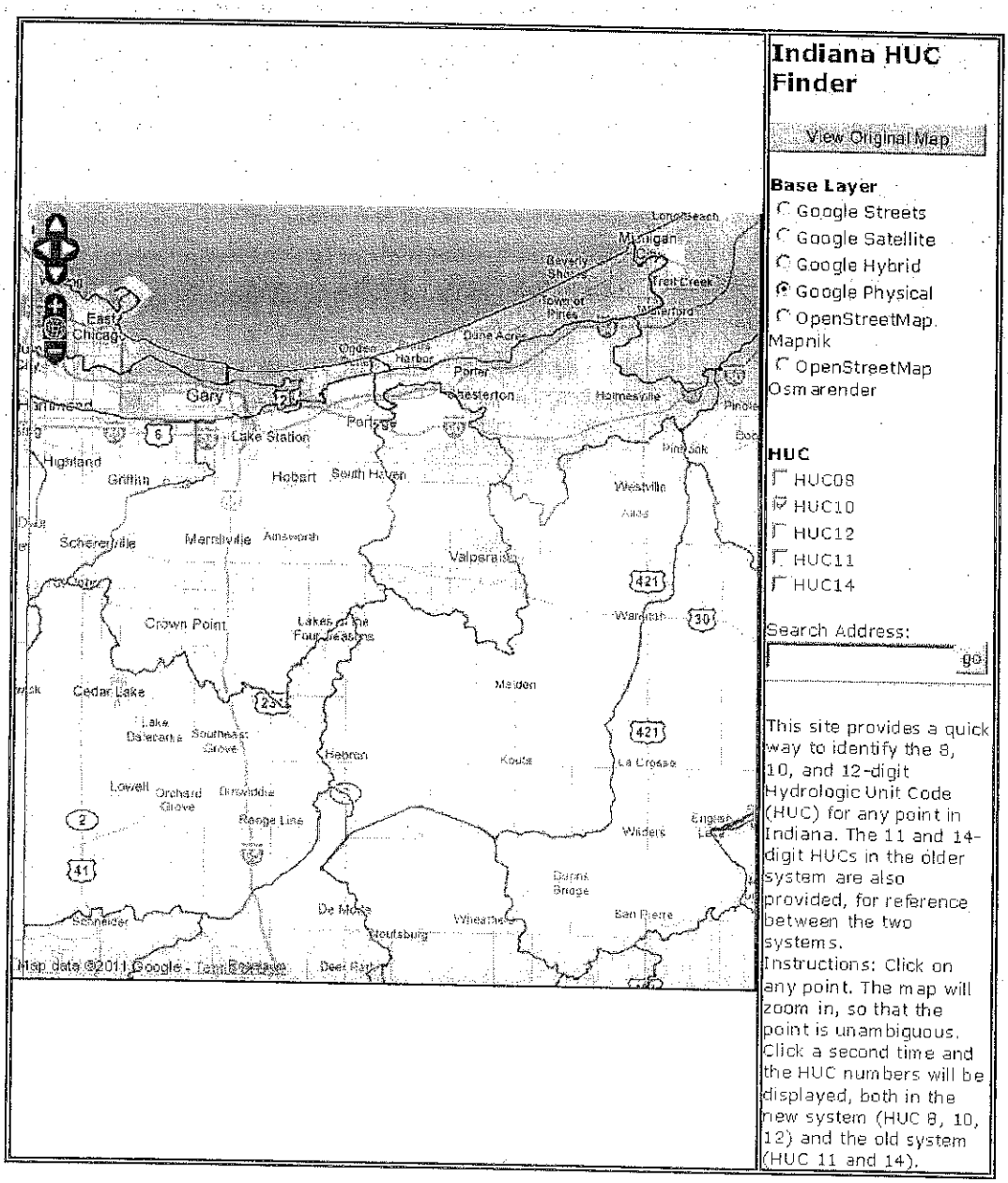


Figure 1. A snapshot of an interactive webpage showing 10 digit HUCs overlayed onto a map of northwest Indiana. An interactive map is available at http://inwater.agriculture.purdue.edu/HUC/.

VI. Trading Across Media Should Presumptively Require a Demonstration of Social or Economic Importance.

Draft Rule Sec. 5(d)(2) states as follows:

> (2) A new or increased loading of a regulated pollutant where:
> (A) the new or increased loading is necessary to accomplish a reduction in the release of one or more air pollutants; and
> (B) there will be an environmental improvement that will occur when the applicant demonstrates that the reduction in the loading of the air pollutant:
> (i) is necessary to meet a state or federal air quality standard or emission requirement; or
> (ii) will substantially reduce human exposure to hazardous air pollutants or other air pollutants that are subject to state or federal air quality standards.

1. The existing rule exemption that trades a decrease in water quality for a reduction in an air pollutant expressly applies only when "the reduction in the discharge of the air pollutant is necessary to meet a state or federal air quality standard or will substantially reduce human exposure to hazardous air pollutants."

2. In contrast, the analogous draft exemption at Section 5(d)(2) applies when "the reduction in the loading of the air pollutant is necessary to meet a state or federal air quality standard or emission requirement, *or will substantially reduce human exposure to* hazardous air pollutants *or other air pollutants that are subject to state or federal air quality standards.*"

3. The Section 5(d)(2) exemption thus contains a phrase that does not appear in the analogous exemption in the existing antidegradation rules (see Appendix A): "will substantially reduce human exposure to . . . *other air pollutants that are subject to state or federal air quality standards.*"

4. This exemption now allows a significant decrease in water quality to be traded for an increase in any air pollutant for which there is a federal or state standard, even if the air pollutants subject to state or federal standards already meet those standards.

5. The problem is that this exemption applies even where the traded air pollutant is meeting the standards. The question then arises: Where an air pollutant involved in the trade is meeting the applicable standards, what is the social or economic benefit (*e.g.*, to public health) of further reductions in that air pollutant? Because the air pollutants subject to state or federal standards may already meet those standards, the social or economic benefit of further reducing those pollutants is questionable.

6. By exempting such trades from a social and economic analysis, Indiana is in essence claiming that such a trade is presumptively beneficial to the area in which the water is

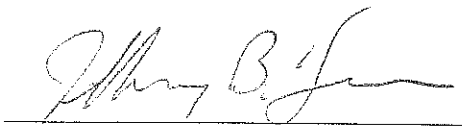
insert "a decrease" per Jeff Hyman's e-mail to MAS 1-13-12

located – that is, that any lowering of any regulated air pollutant is "important economic or social development" even if the air pollutant is not toxic or hazardous and is meeting applicable standards. How can IDEM presume that, where the traded air pollutant is meeting the applicable standards, such a trade provides a social or economic benefit?

7. Moreover, Indiana has not offered publically any information or evidence showing that cross-media pollution trades such as those covered by the Section 5(d)(2) exemption would clearly produce a social or economic benefit "in the area in which the water is located." Without the proper showing by Indiana, EPA has no justification for approving the exemption.

Thank you for considering our comments.

Sincerely,



Jeffrey B. Hyman, Ph.D., J.D.
Staff Attorney
Conservation Law Center
116 S. Indiana Ave.
Bloomington, IN 47408
(812) 856-5737 (Direct Line)
(765) 994-5872 (Cell Phone)
jbhyman@indiana.edu

APPENDIX A

Comparison of Pollution Trading Exemptions in Draft Rule With Analogous Exemptions in Existing Rule
Bolded and italicized text highlights key changes to rule language

The pollutant trading exemptions in the DRAFT rule differ in at least three significant ways compared to the analogous exemptions in the EXISTING antidegradation rules 327 IAC §§ 5-2-11.3 and 11.7.

1. The EXISTING pollutant trading exemptions expressly do not apply to BCCs, whereas the analogous DRAFT exemptions apply to BCCs.

2. The EXISTING exemption that trades a decrease in water quality for a reduction in an air pollutant expressly applies only when "the reduction in the discharge of the air pollutant is necessary to meet a state or federal air quality standard or will substantially reduce human exposure to hazardous air pollutants," whereas the analogous DRAFT exemption applies only when "the reduction in the loading of the air pollutant is necessary to meet a state or federal air quality standard or emission requirement, or will substantially reduce human exposure to hazardous air pollutants ***or other air pollutants that are subject to state or federal air quality standards***." Note that the air pollutants subject to state or federal standards may already meet those standards and thus the benefit of further reducing those pollutants is unclear.

3. The EXISTING pollutant trading exemptions, by using term "the ***commissioner may approve***," expressly allow for the Commissioner's discretion in applying the exemption in any particular case, whereas the analogous DRAFT exemptions remove such discretion and mandate that the exemptions be applied if certain conditions occur.

DRAFT RULE Sec. 5(b)(5)

An antidegradation demonstration that includes the basic information required under subsection (a) and the necessary information required under subsection (c) shall be submitted for the following beneficial activities that result in a new or increased loading:

* * *

(5) A change in loading of a regulated pollutant:

(A) where there is a voluntary, simultaneous, enforceable decrease in the actual loading of the regulated pollutant from sources ***contributing to the same ten (10) digit watershed***; and

(B) with the result that there is a net decrease in the loading of the regulated pollutant ***to the same ten (10) digit watershed***.

EXISTING RULE 327 IAC 5-2-11.3(b)(1)(C)

Notwithstanding clauses (A) and (B), the following do not constitute a significant lowering of water quality: * * * (iii) The following actions: . . .

* * *

(DD) New or increased discharges of a pollutant ***that is not a BCC***, where there is a contemporaneous enforceable decrease in the actual loading of the pollutant

from sources ***contributing to the same body of water*** such that there is no net increase in the loading of the pollutant ***to the same body of water***.

EXISTING RULE 327 IAC 5-2-11.7(c)(2)

The commissioner may allow the following proposed new or increased discharges to occur if the applicant demonstrates that the increases are necessary and that they will result in a net environmental improvement:

(A) New or increased discharges of a pollutant or pollutant parameter ***that is not a BCC*** where there is a contemporaneous enforceable decrease in the actual loading of the pollutant or pollutant parameter from sources ***contributing to the OSRW or to the tributaries to the OSRW*** such that there is no net increase in the loading of the pollutant or pollutant parameter ***to the OSRW***. The ***commissioner may approve*** such an action only if:

(i) the reduction in the discharge of the pollutant or pollutant parameter exceeds the new or increased discharge of the pollutant or pollutant parameter;

(ii) the applicant demonstrates that all reasonable and cost-effective methods for avoiding the new or increased discharge have been taken; and

(iii) the new or increased discharge complies with subdivision (4).

DRAFT RULE Sec. 5(d)(1)

An antidegradation demonstration that includes the basic information required under subsection (a), the necessary information required under subsection (c), and the alternatives analysis information required under subsection (e) shall be submitted for the following beneficial activities that result in a new or increased loading:

(1) A new or increased loading of a regulated pollutant where the following are true:

(A) The new or increased loading is necessary to accomplish a reduction in the loading of another regulated pollutant.

(B) There will be an improvement in water quality in the receiving water or waters. An ***improvement in water quality will occur*** if ***the impact*** from the new or increased loading of the regulated pollutant is:

(i) less bioaccumulative; and

(ii) less toxic than the reduced pollutant or pollutant parameter.

In making these determinations regarding bioaccumulation, the BAF methodology under 327 IAC 2-1.5-13 will be used.

EXISTING RULE 327 IAC 5-2-11.3(b)(1)(C)

Notwithstanding clauses (A) and (B), the following do not constitute a significant lowering of water quality: * * * (iii) The following actions: . . .

* * *

(JJ) An action that will result in a new or increased discharge of a pollutant or pollutant parameter ***that is not a BCC***, if the new or increased discharge is necessary to accomplish a reduction in the discharge of another pollutant or pollutant parameter and the commissioner determines the action will result in a net improvement in water quality in the waterbody. The ***commissioner may approve*** such an action only if:

(aa) ***the reduction in the discharge of the reduced pollutant exceeds the increase in the discharge of the new or increased pollutant***;
(bb) the new or increased pollutant is determined to be significantly less bioaccumulative and toxic than the decreased pollutant; and
(cc) the applicant demonstrates that all reasonable and cost-effective methods for avoiding the new or increased discharge have been taken.

EXISTING RULE 327 IAC 5-2-11.7(c)(2)

The commissioner may allow the following proposed new or increased discharges to occur if the applicant demonstrates that the increases are necessary and that they will result in a net environmental improvement:
* * *
(B) An action that will result in a new or increased discharge of a pollutant or pollutant parameter ***that is not a BCC*** if the new or increased discharge is necessary to accomplish a reduction in the discharge of another pollutant or pollutant parameter. The ***commissioner may approve*** such an action only if:
(i) the new or increased discharge of the pollutant or pollutant parameter is determined to be either:
(AA) less toxic and no more bioaccumulative; or
(BB) less bioaccumulative and no more toxic;
(ii) the applicant demonstrates that all reasonable and cost-effective methods for avoiding the new or increased discharge have been taken; and
(iii) the new or increased discharge complies with subdivision (4).

DRAFT RULE Sec. 5(d)(2)

An antidegradation demonstration that includes the basic information required under subsection (a), the necessary information required under subsection (c), and the alternatives analysis information required under subsection (e) shall be submitted for the following beneficial activities that result in a new or increased loading:
* * *
(2) A new or increased loading of a regulated pollutant where:
(A) the new or increased loading is necessary to accomplish a reduction in the release of one or more air pollutants; and
(B) there will be an environmental improvement ***that will occur*** when the applicant demonstrates that the reduction in the loading of the air pollutant:
(i) is necessary to meet a state or federal air quality standard or emission requirement; ***or***
(ii) will substantially reduce human exposure to hazardous air pollutants ***or other air pollutants that are subject to state or federal air quality standards***.

EXISTING RULE 327 IAC 5-2-11.3(b)(1)(C)

Notwithstanding clauses (A) and (B), the following do not constitute a significant lowering of water quality: * * * (iii) The following actions: . . .
* * *

(KK) An action that will result in a new or increased discharge of a pollutant or pollutant parameter ***that is not a BCC***, if the new or increased discharge is necessary to accomplish a reduction in the release of an air pollutant and the commissioner determines the action will result in a net environmental improvement. The ***commissioner may approve*** such an action only if:

(aa) the reduction in the discharge of the air pollutant is necessary to meet a state or federal air quality standard or will substantially reduce human exposure to hazardous air pollutants;

(bb) ***the reduction in the mass of air pollutant discharged represents a substantial reduction in the total mass released by the applicant***; and

(cc) the applicant demonstrates that all reasonable and cost-effective methods for avoiding the new or increased discharge to the waterbody have been taken.

EXISTING RULE 327 IAC 5-2-11.7(c)(2)

The commissioner may allow the following proposed new or increased discharges to occur if the applicant demonstrates that the increases are necessary and that they will result in a net environmental improvement.
* * *

(C) An action that will result in a new or increased discharge of a pollutant or pollutant parameter ***that is not a BCC*** if the new or increased discharge is necessary to accomplish a reduction in the release of an air pollutant. The ***commissioner may approve*** such an action only if:

(i) the reduction in the discharge of the air pollutant is necessary to meet a state or federal air quality standard or will substantially reduce human exposure to hazardous air pollutants;

(ii) the applicant demonstrates that all reasonable and cost-effective methods for avoiding the new or increased discharge have been taken; and

(iii) the new or increased discharge complies with subdivision (4).

APPENDIX B

Excerpt from January 29, 2010 Letter from Linda Holst, EPA Region 5, to Mary Ann Stevens, IDEM; EPA Comment for Indiana Antidegradation Rules, Second Notice

I. ELEMENTS OF INDIANA'S PROPOSED RULES THAT APPEAAR TO BE INCONSISTENT WITH THE APPLICABLE FEDERAL REQUIREMENTS

* * * *

IV. Indiana's rules exempt certain actions that impact water quality from parts of the antidegradation requirement to demonstrate that a new or increased discharge is necessary to accommodate important social or economic development . . . .

The Federal regulations allow new or increased discharges to lower water quality in high quality waters only after the lowering of water quality is demonstrated to be necessary to accommodate important social and economic development in the area in which the waters are located. Indiana's draft rules contain exemptions from the demonstration requirements for a number of types of activities that may impact water quality. While the "exemption demonstration" in Indiana's rules might address the Federal requirement that any lowering of water quality be technologically necessary (no less degrading alternatives are available), it does not address the social and economic benefits component. To the extent that Indiana is finding, by rule, that the exempted actions are always socially and economically beneficial, Indiana must provide some factual information in the record supporting that assertion. Without such data and analysis in the record, the demonstration is incomplete and therefore inconsistent with the Federal regulations.

Also, [selected exemptions] contemplate offsetting new or increased discharges with other actions within the same 10 digit HUC. Offsetting provisions may be an acceptable basis for determining that antidegradation review is not triggered if it is clear that the offset results in no change in water quality at the point where the new or increased discharge will occur. It is not clear that the spatial relationship between such actions will be such as to ensure that this requirement will be met in all circumstances that would qualify for this exemption.

LSA Document #08-764 (Antidegradation)
MaryAnn Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Avenue
MC 65-45
Indianapolis, IN 46204-2251
mstevens@idem.in.gov

RE: Environmental Coalition Comments, LSA Document #08-764 (Antidegradation), "Third Notice" Draft Rule

Dear Ms. Stevens:

The Conservation Law Center, Environmental Law and Policy Center, Hoosier Environmental Council, Save the Dunes, Sierra Club Hoosier Chapter, Porter County Chapter of the Izaak Walton League of America, Indiana Division of the Izaak Walton League of America, and the Alliance for the Great Lakes are pleased to submit the following comments on the proposed "third notice" antidegradation rule published in the Indiana Register on December 7, 2011 (LSA Document #08-764). Our organizations have members or clients in Indiana and surrounding states who will be directly affected by the implementation of Indiana's antidegradation rules.

Our organizations have been involved in antidegradation policy development efforts in Indiana for many years. We have participated throughout IDEM's workshop and rulemaking processes initiated in 2007 and submitted formal comments to IDEM on numerous occasions, including by correspondence dated April 9, 2008, June 23, 2008, October 15, 2008, November 13, 2008, May 7, 2009, January 29, 2010, June 18, 2011, July 29, 2011, and September 14, 2011. On December 17, 2009, members of our coalition filed a petition under 40 CFR § 123.64 requesting U.S. EPA to correct several serious deficiencies in the Indiana water program, including the absence of adequate antidegradation implementation procedures. EPA has yet to respond to our petition.

We are pleased that this long delayed rulemaking process is moving forward and close to completion. The Department incorporated several substantive and structural revisions that improve the overall readability and substance of the draft rule in several respects. We are

confident that the current draft will help to protect the quality of Indiana waters and should be approved, subject to several concerns noted below. Avoiding further delay, these remaining concerns can be addressed by statements or clarifications included in IDEM's response to comments, U.S. EPA's approval document, or in separate guidance. We expect that EPA's decision document will address and discuss IDEM's assumptions, interpretations, and clarifications in order to minimize any disputes or confusion about the proper interpretation of these rules.

It is critical that IDEM and the Indiana Water Pollution Control Board avoid further delay in the adoption of these important rules. Indiana's rivers, streams, and lakes have endured years of unnecessary degradation and will continue to do so until the state adopts and begins implementing the antidegradation implementation procedures required by federal law. We appreciate the opportunities for public participation and input in the development of these rules over the past five years. All parties have had an adequate opportunity to participate and comment on issues of concern. It is now time to complete this process and adopt these rules.

I. Inclusion of Threatened or Endangered Species Defined Under State Law

Several commenters expressed concern that prior versions of the draft rule failed to specifically include threatened and endangered species defined under state law. In its response to comments, IDEM agreed that "the definition of endangered or threatened species in the antidegradation standards and implementation rule should include state listed endangered or threatened species." IDEM Summary/Response to Comments at p. 81. Thus, IDEM stated that it "anticipates changing the definition for consideration by the Water Pollution Control Board" to include state listed species. Id. We agree that this change should be made.

II. General Permits

There has been extensive discussion in the stakeholder process of ways to reconcile general permits with case-specific antidegradation review. In particular, we discussed U.S. EPA's concern that activities covered by general permits are not given a "blanket exemption" (Jan 2010 letter), how IDEM intends to avoid cumulative degradation resulting from the use of

general permits, and how IDEM will exercise independent review and require an individual permit when necessary to avoid significant cumulative degradation.

The environmental coalition submitted detailed comments on these issues in response to IDEM's second notice draft rule. We had hoped that the revised draft would respond to these comments and recommendations and include more detail on how IDEM intends to conduct antidegradation review of activities authorized by general permits. Unfortunately, the third notice draft does not provide much additional guidance or clarification for how the rule will be implemented.

As discussed in our June 16th, 2011 letter (attached), it is our understanding that IDEM's antidegradation review of NPDES general permits as set forth in Sec. 1(c)(1) of the draft rule should lead to conditions in the general permits to ensure that:

1. sufficient information is provided in the applicant's notice of intent for general permit coverage (NOI) for IDEM to determine the magnitude of the proposed lowering of water quality;
2. there is adequate public notice and access to the information contained in these NOIs:
3. any water quality lowering resulting from use of the general permit has been determined to either be "insignificant" or "necessary to accommodate important social or economic development" on an individualized basis;
4. general permits will not be used if they would have the effect of lowering water quality in OSRWs or ONRWs; and
5. an individual permit will be required if the project would lead to significant degradation on an individual or cumulative basis.

Please confirm in response to comments if our understanding is correct to avoid the need for further clarification and discussion with EPA before the rule is approvable.

III. 401 Certifications

Our comments on the second notice draft pointed out that the Department has failed to adequately explain how antidegradation reviews will take place for CWA Section 404 permits and Section 401 certifications. In response, the Department stated that it believes that its current 401 certification process satisfies antidegradation review requirements. IDEM Summary/Response to Comments at p. 10. The Department further explained that it uses

USACE guidance on 404 permitting when issuing 401 certifications. (40 CFR Part 230, Section 404(b)(1) Guidelines). Id.

Although the 404(b) Guidelines' "avoid, minimize, and mitigate" framework, if properly applied, may provide an adequate substitute for the "alternatives analysis" part of the antidegradation review, it is not clear how the 404(b) Guidelines provide an adequate substitute for the socioeconomic review. The Department should clarify how it intends to administer its 401 certification process to ensure that degradation is necessary to accommodate "important economic or social development in the area in which the waters are located" as required by Section 131.12(a)(2). Further, the Department should not simply "rubber stamp" the Corps' 404 permitting determination but should make clear that it will undertake an independent review of the alternatives analysis as well as the socioeconomic considerations implicated by activities requiring Section 401 certifications.

IV. Exemptions

The draft continues to exempt certain cross-pollutant and intra-watershed trades from a full socioeconomic analysis. (See Sec. 5(b)(5) and Sec. 5(d)(2)). IDEM's rationale is apparently that such trades are presumptively socially and economically beneficial so there is no need to independently perform a socioeconomic review. We have expressed concern about this blanket assumption on a number of occasions. See, e.g., June 18, 2011 Letter at p. 11 (attached). Specifically, it is not clear how IDEM can determine ahead of time that every single cross-pollutant or intra-watershed trade will lead to important economic or social development. A socioeconomic review is necessary to distinguish "good" trades from "bad" trades. Id. U.S. EPA Region 5 has informed IDEM that "to the extent that Indiana is finding, by rule, that the exempted actions are always socially and economically beneficial, Indiana must provide some factual information in the record supporting that assertion." Jan. 29, 2010 Letter at p. 2. IDEM should further explain how it intends to ensure that any listed activities exempted from a full socioeconomic review are nonetheless "necessary to accommodate important economic or social development in the area in which the waters are located," as required by Section 131.12(a)(2).

V. Loading capacity / cumulative de minimis caps

IDEM's response to comments has helped to clarify the concept of "de minimis" discharges to lakes. We now understand that an increased loading to an Indiana lake can be considered "de minimis" only in cases where an alternative mixing zone has been established. As the Department explained, "[a] discharge to a lake that does not have an approved alternate mixing zone does not have any available loading capacity." IDEM Summary/Response to Comments at p. 63. Thus, "[a]ny discharger without a pre-existing alternate mixing zone that proposes a new or increased discharge will be required to submit an antidegradation demonstration." Id. at p. 23.

We remain concerned, however, with the method that the Department will use to calculate the available loading capacity of rivers and streams. In particular, we are concerned about IDEM's proposed use of additional wastewater discharge flow in the calculation of the loading capacity of a receiving water. See IDEM Summary/Response to Comments at 90. How does IDEM intend to treat a situation where process water is withdrawn upstream of the discharge point and then returned to the river in the effluent stream? Under such a circumstance there is no water "added" to the river when the effluent is discharged so it does not make sense to include the volume of effluent when calculating loading capacity. A similar situation is present where the discharger takes clean groundwater that had been reducing pollution concentrations in the receiving water body. IDEM should clarify for the record how it intends to calculate total loading capacity in these situations.

We emphasize again that any proposal to limit antidegradation analysis only to situations where an increased permit limit is contemplated must be rejected. Antidegradation is about preserving assimilative capacity and avoiding unnecessary new or increased pollution. This is true even as to pollutant loadings that were not limited in the past because they were not viewed as having a reasonable potential to cause or contribute to violations of water quality standards.

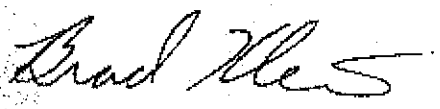
VI. BADCT concept

The draft rule includes a technology-based treatment limit (BADCT) as a way to expedite and simplify a full evaluation of technology alternatives in situations where the applicant has demonstrated that there are no nondegradation or mitigation alternatives available. As we have pointed out in the past, it is not clear from the record what process the Department will use to

review and update BADCT limits to ensure that the limits continue to reflect the best control technology available as treatment technology continues to improve. See June 18, 2011 Letter at 13. IDEM should further explain how it intends to keep BADCT limits up-to-date.

Respectfully submitted,

For the Antidegradation Environmental Coalition:



Bradley Klein, Senior Attorney
Albert Ettinger, Of Counsel
Environmental Law and Policy Center
35 E. Wacker Drive, suite 1600
Chicago, IL 60601

Jeffrey B. Hyman, Ph.D., J.D.
Staff Attorney
Conservation Law Center
116 S. Indiana Ave. Suite 4

Kim Ferraro, Water Policy Director
Tim Maloney, Senior Policy Director
3951 North Meridian, Suite 100
Hoosier Environmental Council
Indianapolis, IN 46208

Jeanette Neagu
President
Save the Dunes

Bowden Quinn
Conservation Program Coordinator
Sierra Club Hoosier Chapter
1915 W. 18th St., Suite D
Indianapolis, IN 46202

Charlotte Read
Porter County Chapter of the Izaak Walton League of America

Daniel Wilson
Division president

Indiana Division of the Izaak Walton League of America

Lyman Welch
Manager, Water Quality Program
Alliance for the Great Lakes

Summary of June 9, 2011 Antidegradation Meeting with Environmental Coalition

June 18, 2011

Bruno Pigott
Assistant Commissioner
Office of Water Quality
Indiana Department of Environmental Management
100 North Senate Avenue
Indianapolis, IN 46204-2251
bpigott@idem.in.gov

Martha Clark Mettler
Deputy Assistant Commissioner
Office of Water Quality
Indiana Department of Environmental Management
100 North Senate Avenue
Indianapolis, IN 46204-2251
mclark@idem.in.gov

Steve Roush
Office of Water Quality /NPDES Permits Branch,
Indiana Department of Environmental Management
100 N. Senate Av.,
Indianapolis, IN, 46204-2251.
sroush@idem.in.gov.

Dave Wagner
Water Pollution Control Board
dmcwag@aol.com

Dear Martha, Bruno, Steve, and Dave:

Thank you once again for meeting with us on June 9th to discuss the May 6, 2011 draft of the Indiana antidegradation rule that is slated for preliminary adoption at the July 27th meeting of the Water Pollution Control Board. We appreciate the good discussion we were able to have about the environmental community's main remaining questions and concerns about the current draft of the rule. We hope that this summary of our discussion will help us continue the conversation about revisions or clarifications that could help expedite the remaining steps in this rulemaking process and improve the chances for U.S. EPA's approval of the final rule.

The following were in attendance at the meeting:

In person:

Martha Clark Mettler – IDEM
Bruno Pigott – IDEM
Steve Roush – IDEM
Dave Wagner – Water Pollution Control Board

Summary of June 9, 2011 Antidegradation Meeting with Environmental Coalition

Brad Klein – ELPC
Dick Miller – Sierra Club
Bowden Quinn – Sierra Club
Jeff Hyman – Conservation Law Center

On the phone:

Tim Maloney – Hoosier Environmental Council
Lyman Welch – Alliance for the Great Lakes
Nicole Barker – Save the Dunes
Barbara Sha Cox – Indiana CAFO Watch

DISCUSSION ITEM 1. MEANING OF "REGULATED POLLUTANT": DRAFT SECTION 1 AND SECTION 2(43).

The "trigger" for an antidegradation review is whether or not there will be a new or increased loading of a "regulated pollutant" as defined by the rule. There have been extended discussions of how to define the trigger throughout this rulemaking process. (In prior drafts they were called "pollutants of concern.") From our prior discussions, we understood that "pollutants of concern" would include any pollutants that could have a potentially detrimental effect on the designated or existing uses of a water if discharged in sufficient amounts.

During the meeting, we asked whether the change from "pollutant of concern" to "regulated pollutant" in the new draft rule had implications for the coverage of pollutants by the antidegradation rule. You stated that IDEM's intent was not to narrow the scope of pollutants covered by the antidegradation rule. You pointed out that key language in the definition of "regulated pollutant" is in Section 2(43)(B), which states that a regulated pollutant includes "any other parameter that may be limited in an NPDES permit." You highlighted that this definition is broader than currently limited parameters in existing NPDES permits, and includes any parameter that "may" be limited in "an" NPDES permit.

You also pointed out that at one end of the spectrum, there are substances for which very little information exists on potential harmful effects, and those substances are not going to be limited in any NPDES permit until more data are available. Those substances are thus not "regulated pollutants." At the other end of the spectrum are those pollutants currently limited in existing NPDES permits, which are clearly covered by the definition of "regulated pollutant." In between are substances for which we have information about harmful effects and for which we can rationally develop a permit limit, but which are not currently limited in existing permits. Once IDEM is aware of the pollutants an antidegradation applicant plans to discharge (if the antidegradation applicant already holds an NPDES permit, the applicant/permit holder has a duty to disclose new substances in its discharge), IDEM has an opportunity to develop a permit limit for that substance. A weakness in this process, however, may be in IDEM's process for developing new permit limits for newly regulated pollutants.

As discussed at length in the stakeholder process, it is important to remember that the threshold for requiring an antidegradation review for a regulated pollutant is lower than the "reasonable potential to exceed criteria" method that is typically used as the threshold for establishing WQBEL's. That is because antidegradation review is intended to protect the *assimilative capacity* of the water body, which by definition is the increment of water quality that is better than the criteria.

Takeaways:

- In guidance, IDEM should clarify its intent to use its "best professional judgment" to require antidegradation reviews for new or emerging pollutants present in a discharge where the scientific literature indicates that the pollutant has the potential to adversely affect aquatic life, recreation, or other designated or existing uses of a waterbody.

- In guidance, IDEM should clarify that the trigger for consideration as a "regulated pollutant" for the purposes of antidegradation review is <u>not</u> limited to those pollutants that have been determined to have a reasonable potential to violate water quality standards.

DISCUSSION ITEM 2. GENERAL PERMITS: DRAFT SECTION 1(C).

There have been extensive discussions in the stakeholder process of ways to reconcile general permits with case-specific antidegradation review. The environmental coalition submitted detailed comments on this issue in response to IDEM's second notice draft rule. We had hoped that the revised draft would respond to these comments and recommendations and include more detail on how IDEM intended to conduct antidegradation review of activities authorized by general permits. Unfortunately, the revised rule simply recites the statutory language at IC 13-18-3-2 rather than provide guidance or clarification for how this statute will be implemented.

In the meeting, we asked how IDEM intended to "complete an antidegradation review" of NPDES general permits as set forth in Sec. 1(c)(1) of the draft rule in order to ensure that there is some individualized review of projects that may lead to significant degradation. As Dave pointed out, a general permit shouldn't be automatic. Instead, the antidegradation review should lead to conditions in the general permit to ensure that:

1. sufficient information is provided in the applicant's notice of intent for general permit coverage (NOI) for IDEM to determine the magnitude of the proposed lowering of water quality;
2. there is adequate public notice and access to the information contained in these NOI's;
3. any water quality lowering resulting from use of the general permit has been determined to either be "insignificant" or "necessary to accommodate important social or economic development in the area of the water";
4. general permits will not be used if they would have the effect of lowering water quality in OSRWs or ONRWs; and

5. an individual permit will be required if the project would lead to significant degradation on an individual or cumulative basis.

During the meeting, you indicated that IDEM did not intend to allow the use of general permits to circumvent antidegradation requirements and that the agency will use its existing authority to require individual permits where it appears from the NOI that a proposed discharge may in fact lead to significant degradation of water quality. We recommended that you amend Section 1(c) of the rule to make these commitments explicit rather than implicit. We suggested that, at the very least, you thoroughly explain how general permits will be reviewed and processed as part of your rule submission package to U.S. EPA. A guidance document explaining the process to the regulated community and the public would also be very helpful.

Takeaway:

- Revise Sec. 1(c) to clarify that antidegradation reviews for general permits will meet the conditions outlined above.

DISCUSSION ITEM 3. MERCURY: SECTIONS 3(C) AND 4(A)

In Section 3(c) of the draft rule, mercury, a Bioaccumulative Chemical of Concern (BCC), is singled out and handled like a non-BCC in OSRWs within the Great Lakes basin (which includes the Indiana waters of Lake Michigan). A new or increased loading of mercury that causes a significant lowering of water quality would be allowed in OSRWs within the Great Lakes basin, even though significant loadings of other BCCs to those waters would be prohibited.

Similarly, in draft Section 4(a), mercury is handled like a non-BCC in ONRWs and Great Lakes basin OSRWs. A "short-term" exemption from an antidegradation demonstration would be allowed for mercury in ONRWs and OSRWs, even though the exemption is not provided for other BCCs discharged to those waters.

Because prior drafts of the rule have not handled mercury in this manner, we asked you to justify why significant loadings of mercury should be allowed in ONRWs and Great Lakes basin OSRWs even though significant loadings of other BCCs are not allowed. We asked why a proposal to increase mercury loading as a product of industrial process should not be treated like other BCCs. We pointed out that a mercury variance may be an available option and that the exemption in Section 4(A)(ii) would render "nonsignificant" any new or increased loading resulting from a "change in intake water pollutants not caused by the discharger."

In response, you suggested that one justification for handling mercury differently than other BCCs may be that POTWs may not be able to control the input of mercury-tainted sewage into the treatment process and thus the POTWs would not be responsible for outputs of mercury in their effluent. You may not have considered whether such a situation is covered by the Section 4(A)(ii) exemption from "significance." In any event, if IDEM believes a particular situation such as intake of mercury-tainted sewage to POTWs should be exempted from "significance" and handled differently than other BCCs, then IDEM can draft a rule provision

narrowly tailored to that situation and submit the factual justification for the provision in its promulgation package to EPA. The current draft exemptions for mercury are, however, too broad, and to our knowledge have not been justified by data. A blanket free pass for mercury loadings into ONRWs and Great Lakes basin OSRWs is the wrong approach and is unlikely to be approved by EPA.

Takeaway:

- The record does not justify the blanket exemptions for mercury loadings and it is not clear how these exemptions could be approved by EPA.

DISCUSSION ITEM 4. HANDLING OF TRIBUTARIES TO OSRWS: SECTIONS 3(C) AND 6(B)

This discussion was grounded in the notion that when attempting to protect the water quality of a particular water, such as a lake, discharges into upstream tributaries must be considered along with direct discharges into the water because the upstream discharges may lower the water quality downstream. In other words, both direct and indirect discharges to the water must be considered.

This commonsense notion is expressly recognized in two provisions in the current draft rule. Section 3(a)(1)(b)(ii) calls for controls on point and nonpoint sources to ensure that "any designated use of a downstream water is maintained and protected." Section 3(d)(2)(B) states, "A discharge to a tributary of an ORNW . . . shall not be allowed if it would cause an increase in the ambient concentration of that pollutant in the ORNW."

Furthermore, the requirements in draft Section 7(a) for water quality improvement projects implicitly incorporates this notion of upstream discharges having downstream effects by applying the requirement when a discharger proposes "to cause a significant lowering of water quality in an OSRW" and for "each activity undertaken that will result in a significant lowering of water quality in an OSRW." The use of the words "cause" and "result" imply that the discharge that causes or results in the lowering of water quality in the OSRW may be either a discharge directly to the OSRW or a discharge to a tributary that flows into the OSRW.

Throughout the new draft rule, however, previous references to "portions of waters upstream of an OSRW that impact the water quality of the OSRW" have been stricken. You said that this change was justified because now all waters of the state are subject to the same uniform de minimis standard – i.e., no more than 10% of available capacity individually used and 90% of benchmark available capacity cumulatively maintained. But as we pointed out at the meeting, in at least two subsections the reference to upstream waters was stricken even though the subsections are unrelated to the de minimis standard.

First, Section 6(b) provides a public meeting on an antidegradation demonstration if "the proposed discharge is to an OSRW." The prior draft version of the rule had the following language: "[if] the proposed discharge is to an OSRW or to portions of waters upstream of an OSRW that impact the water quality of the OSRW." Your concern appears to be that a public meeting should not be held for significant discharges to tributaries of OSRWs unless there is an

associated significant lowering of water quality in the OSRW itself. This subsection could easily incorporate both of our concerns by stating the following:

> . . . The commissioner shall hold a public meeting on the antidegradation demonstration in accordance with 327 IAC 5-2-11.2 if:
>
> (1) the proposed discharge will result in a significant lowering of water quality in an OSRW, irrespective of whether the discharge is directly to the OSRW or to an upstream water that flows into the OSRW.
>
> * * *

Second, Section 3(c)(1) provides, "For OSRWs inside the Great Lakes basin, no new or increased loading of a BCC except mercury shall be allowed that causes a significant lowering of water quality of the OSRW." The prior draft version had the following language: "(1) For OSRWs inside the Great Lakes basin, as well as the portions of waters upstream of an OSRW that impact the water quality of the OSRW inside the Great Lakes basin, no new or increased loading of a BCC shall be allowed that causes a significant lowering of water quality of the OSRW." The language of the prior draft clearly and properly incorporated the notion of upstream discharges significantly lowering water quality in the downstream OSRW. Moreover, the prior draft language served your purposes because Section 3(c)(1) would not have prohibited a discharge to a tributary unless that discharge "caused" a significant lowering of water quality of the OSRW itself. By striking the phrase "as well as the portions of waters upstream of an OSRW that impact the water quality of the OSRW inside the Great Lakes basin," you have unnecessarily narrowed the application of Section 3(c)(1) to new or increased loadings directly into the OSRW and have deleted application of the Section to new or increased loadings in tributaries even if those loadings cause a significant lowering of water quality of the OSRW.

Takeaways:

- Revise Section 6(b) to clarify that a public meeting will be held if a proposed discharge would cause a significant impact to a downstream OSRW.

- Restore the deleted language in Section 3(c) so that the intent of the Tier 2.9 section is not defeated by allowing discharges into tributaries of OSRWs to significantly degrade the OWRWs downstream.

DISCUSSION ITEM 5. SHORT-TERM EXEMPTION: SECTIONS 4(A) AND (B)

During the meeting, we expressed our concern that although the exemptions for "short-term" loadings in Sections 4(a) and (b) are improved from early drafts of the rule, a remaining problems is that there is still no consideration of the magnitude of exempted loadings, particularly the cumulative effect of multiple exempted loadings on the assimilative capacity of the water. We pointed out that EPA views this exemption as requiring both a time component and a magnitude component:

> A direct or upstream source that would result in a temporary *and* limited effect on ONRW water quality may be authorized. . . . As a *non-binding* rule of thumb, activities with durations less than one month *and* resulting in less than a 5% change in ambient concentration will be deemed to have temporary and limited effects.

(Emphasis in original).[1]

We also pointed out that IDEM's response to this concern, as expressed in IDEM's responses to our 2nd-notice comments, was inadequate because (1) the requirement that "all reasonable methods for minimizing or preventing the new or increased loading must be taken" does not require an assessment of the cumulative effects of the exemption; (b) the requirement that "any short-term, temporary discharge authorized in a NPDES permit will be required to meet any applicable water quality-based effluent limitations" does not address the actual effects of the exemption on assimilative capacity of a waterbody (meeting the WQBEL's is not the issue and can be assumed); and (3) the fact that the referenced EPA guidance from Region VIII "is just a 'non-binding rule of thumb' for facilities in Region VIII" does not negate the importance and wisdom of considering the cumulative magnitude of "short-term" exemptions on assimilative capacity. If IDEM will not provide for an assessment of such effects in the rule, then IDEM should provide in guidance and in the promulgation package to EPA a plan for how IDEM would respond to multiple requests for "short-term" exemptions and how it would consider the cumulative effects of multiple "short-term" impacts.

Finally, we asked how even a temporary discharge of mercury into a waterbody, as allowed under draft Section 4(a), would meet the requirement in Sections 4(a)(4) and 4(b)(4) that the "the discharge will result only in a short-term, temporary (not to exceed twelve (12) months) lowering of water quality," given that mercury bioaccumulates in living tissue and is very persistent in the environment.

Takeaways:

- Revise Section 4(a) and 4(b) to ensure that the *magnitude* of a proposed loading is accounted for as well as its timing when determining whether it qualifies for an exemption from antidegradation review.

- Clarify the circumstances in which discharges of BCCs can be considered to have only "short-term" effects on water quality considering the fact that BCCs bioaccumulate in tissue and are persistent in the environment.

DISCUSSION ITEM 6. PROBLEMS WITH USING PROPOSED EFFLUENT FLOW TO CALCULATE LOADING CAPACITY: SECTION 2(53)

The calculation of total loading capacity, and thus the calculation of available loading capacity, includes the new or increased effluent flow proposed by the antidegradation applicant. We are concerned that in low-flow streams especially, multiple new or increased loadings of a pollutant will be granted de minimis exemptions if the loadings are associated with added effluent flows. We pointed out at the meeting that in the May 15, 2009 comments by EPA on a past draft of the rule, EPA stated that to the extent that this provision effectively allows for an infinite number of "de minimis" increases as long as there is a corresponding flow increase, it

[1] U.S. EPA Region VIII Guidance: Antidegradation Implementation (August 1993), Part IV(D), Page 11.

seems inconsistent with the intent of the Federal regulations at 40 CFR 131.12(a)(2) and 132, Appendix E, I.B. and is likely to be the litigated if approved by EPA.

You responded that including the new or increased effluent flow in the calculation of "total loading capacity" is consistent with EPA guidance for calculations on permit limits, and that not doing so produces absurd results.

We then pointed out that a loophole in the draft rule arises if the proposed new or increased effluent flow is used to calculate loading capacity because the applicability of the rule is limited to new or increased "loadings" only, and does not account for "concentration." We discussed the following scenario. An applicant's new loading of a pollutant to a low-flow stream is granted a de minimis exemption because the proposed new loading will be accompanied by sufficient new effluent flow that reduces the concentration of the pollutant. Assume that six months later the discharger reduces the proposed amount of effluent flow, for whatever reason. But because Section 1(b) of the draft rule states that the rule's procedures apply only if a new or increased "loading" occurs,[2] without regard to a change in the concentration of the pollutant, the antidegradation rule provides no authority to recalculate and reconsider whether the new loading is still de minimis.

Takeaway:

- Amend the applicability Section 1 and the definition of "degradation" in Sec. 2(14) to include increases in loading *or concentration* of a regulated pollutant in order to avoid the loophole of a discharger reducing the assimilative capacity of a waterbody by reducing effluent flow after a de minimis exemption has been granted for a loading.

DISCUSSION ITEM 7. ISSUES OF SPATIAL SCALE IN CALCULATION OF TOTAL, AVAILABLE, AND USED LOADING CAPACITY, BENCHMARK AVAILABLE CAPACITY, AND DE MINIMIS: SECTIONS 2(2), 2(53), AND 4(C)

We argued during the meeting that carefully considering the spatial scale at which loading capacity is calculated is critically important for an accurate determination of the impact of a loading on water quality and to ensure consistency with federal regulations. Yet, as we pointed out, the draft rule does not identify the location at which water quality calculations are to take place.

In the draft rule, to be considered de minimis, each individual new or increased loading of a regulated pollutant must use less than or equal to 10% of the "available loading capacity" determined at the time the loading is proposed. Moreover, 90% of the available loading capacity established at the time of the request for the "initial increase" in the loading of the regulated pollutant (i.e., the "benchmark" available capacity) must remain given the proposed loading

[2] Draft Section 1(b): Except as provided under section 4 of this rule, the antidegradation implementation procedures established by this rule apply to a proposed new or increased loading of a regulated pollutant to a surface water of the state that will result from a deliberate action including a change in process or operation that:

(1) adds additional regulated pollutants; or

(2) creates an increase in loading of a regulated pollutant already being discharged.

combined with the other sources of the regulated pollutant (the earliest date on which the benchmark available capacity is determined appears to be the date a new antidegradation rule is approved).

We asked you to consider the river system illustrated in Figure 1 below.

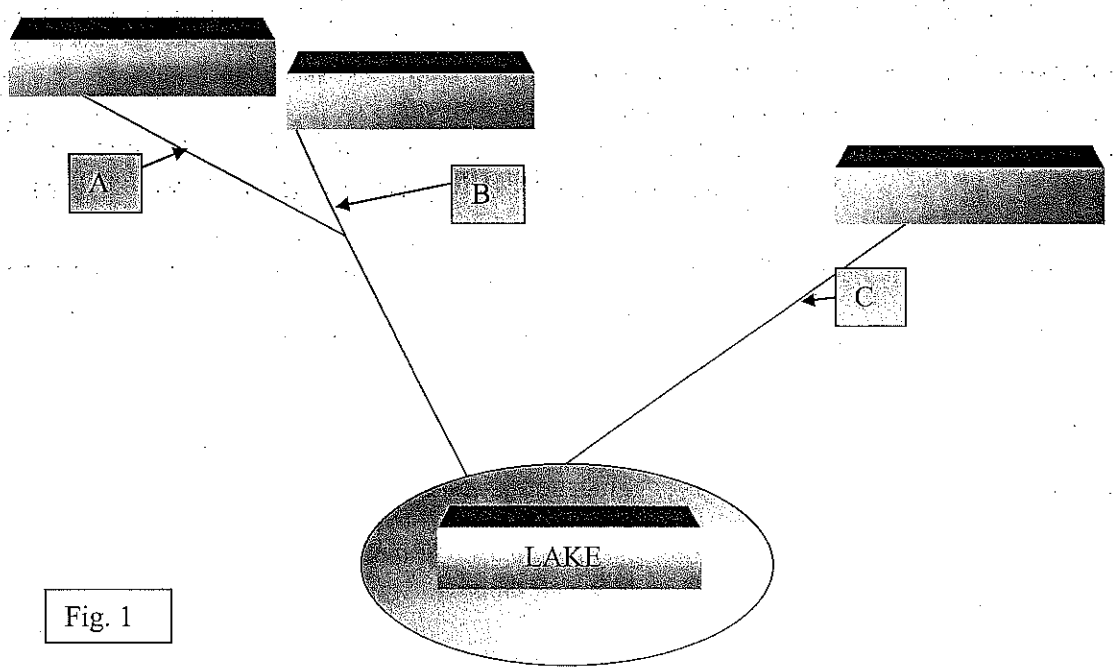


Fig. 1

In this hypothetical scenario, three facilities (A–C) discharge pollutant X at various points in the stream system, which flows into a lake. Facility "A" is the first to propose an increased loading of pollutant X along with an increase in effluent flow; then facility "B" proposes an increased loading and lastly facility "C."

When any facility proposes to increase loading of pollutant X into the stream, the increased loading may use existing assimilative capacity locally in the stream segment as well as system-wide as measured at the inlet to the lake. Both effects are important and neither can be ignored.

On the one hand, unless the used loading capacity, the available loading capacity, and the benchmark available capacity are measured at the downstream point in the water system, the effect of the increased loading on the assimilative capacity of the lake will remain undetermined. Note that the local effect of the loading on the tributary's assimilative capacity may not reveal the downstream effect on the lake's assimilative capacity. For example, in Figure 1, after facility "A" uses a portion of the lake's assimilative capacity, a proposed increased loading by facility "B" or "C" may violate the 90% benchmark capacity at the lake even though the local tributary effect of the loading is de minimis. The effect of a facility's loading on the lake is especially important if the lake is an OSRW such as Lake Michigan. Draft Section 7 of the rule cannot be

implemented without knowing whether a proposed new or increased loading in a tributary to an OSRW will "cause" a significant lowering of water quality in the OSRW.

Furthermore, the draft rule defines the benchmark available capacity in Section 4(c)(1)(A)(ii) as "ninety percent (90%) of the available loading capacity established at the time of the request for the initial increase in the loading of a regulated pollutant." If the geographic scale of "initial increase" is the local tributary, each facility will get a new benchmark when it proposes an increased loading of pollutant X, but this scheme defeats the purpose of a cumulative cap. Thus, the geographic scale of "initial increase" must incorporate downstream cumulative effects. You pointed out that an existing Non-rule Policy Document on determining downstream impacts of upstream discharges for the Great Lakes system could be used as a basis for guidance on downstream determinations within and outside of the Great Lakes system.

On the other hand, measuring loading capacity and available capacity only at the downstream point may leave undetermined the local effect of a facility's proposed loading. A loading may be "significant" at the upstream point even though it is de minimis at the downstream point (because of more flow at the downstream point). If the loading is significant at the local scale of the tributary, the antideg demonstration may require a local evaluation of social and economic conditions. For example, the local tributary into which the facility discharges may contain species of concern, making the local effect on assimilative capacity important. Also, the tier 2 and 2.9 antidegradation standards in draft Section 3 require that the social and economic importance of the proposed project be evaluated "in the area in which the surface waters are located." Although the phrase "in the area" is not specified, it must be interpreted in light of the geographic area in which the majority of the facility's workers live and in which the facility contributes to the community tax base. If Figure 1 represents a large watershed, the "area in which the surface waters are located," with respect to facility "A's" loading, may be far from the inlet to the lake.

To summarize, if you measure loading capacity in the tributary only, you can repeatedly put new or increased loadings in different tributaries/mixing zones without counting the impact downstream. But if you calculate capacity downstream only, you may not account for significant local impacts in the tributary. You asked what the solution is to this problem of scale, and we responded that, especially for Lake Michigan, the effect of a proposed new or increased loading on assimilative capacity and the determination of its "significance" must be evaluated at both the local upstream area and the cumulative downstream area.

Takeaways:

- Clarify either through rule amendment or a guidance document the method by which IDEM will calculate individual and cumulative impacts in order to ensure that the impacts of de minimis discharges are considered at an appropriate geographic scale.

- Consider using Non-rule Policy Document #1 to ensure that IDEM's calculation of de minimis discharges appropriately account for impacts to downstream water bodies, especially OSRWs such as Lake Michigan.

DISCUSSION ITEM 8. EXEMPTIONS FROM SOCIAL AND ECONOMIC ANALYSIS FOR ACROSS-WATERSHED AND INTER-MEDIA POLLUTION TRADING: SECTIONS 5(B)(5), 5(B)(1), AND 5(D)(2)

Although various pollutant trading proposals could represent an overall net benefit to the environment, there must be a mechanism for IDEM to distinguish "good" trades from "bad" trades. As we discussed in the meeting and summarized below, the current blanket exemptions for across-watershed and inter-media trades do not allow IDEM or the public to determine whether a specific trading proposal is a good one. The information that would be generated by an antidegradation socioeconomic review is exactly the kind of information that is necessary for IDEM to determine whether a trading proposal is worth pursuing.

Section 5 of the draft rule exempts particular activities from components of the requirement that the applicant demonstrate that a new or increased discharge is necessary to accommodate important economic or social development in the area in which the waters are located. That is, the draft rule exempts particular activities from a full antidegradation demonstration. Although IDEM does not claim that the lowering of water quality associated with these activities are "insignificant," these exempted activities are subject to only the first component or first two components of the antidegradation demonstration. These exempted activities appeared in prior drafts of the rule as "exemptions" from *any* antidegradation demonstration. In the new draft rule, the specified activities are still exemptions in so far as the activities are exempted from a full demonstration that the proposed lowering of water quality is necessary to accommodate important economic or social development in the area in which the waters are located.

As we have argued in comments on past drafts of the rule, any "exemption" from the full antidegradation demonstration, to be consistent with the perspectives of EPA and the courts, must be associated with at least one of three types of situations: (1) changes in loading result in a de minimis decrease in water quality in the receiving waterbody over the range of likely loadings, including a "temporary" lowering of water quality; (2) the applicant has already submitted the required information and this submittal sufficiently substitutes for the omitted component of the antidegradation demonstration; (3) IDEM presents factual information in the record supporting the assertion that the omitted component of the antidegradation demonstration is satisfied for all of the activities covered under the exemption. If at least one of these criteria is not met, it is not sufficient to require only "some level" of an antidegradation demonstration for activities that result in a significant lowering of water quality. Draft Sections 5(b)(5), 5(b)(1), and 5(d)(2) in particular are inconsistent with the federal regulations because none of the above three criteria have been met.

Draft Sections 5(b)(5) and 5(b)(1) are both intra-watershed pollution trades. At the meeting we pointed out that even if these provisions arose from specific scenarios that IDEM believes create social and economic benefits for the area in which the waters are located, these provisions as written are overly broad and the activities potentially included cannot be justified as a class.

Draft Section 5(b)(5) allows, without a socioeconomic justification, a significant decrease in water quality to occur at one location of a HUC-10 watershed so long as a decrease in loading at another location in the watershed offsets the increase at the watershed scale. Although the required net decrease in loading at the watershed scale may produce an improvement in water quality at the outlet of the watershed, there is no reason to believe that this trade would accommodate important economic or social development in the area in which the waters are located, as required by the tier 2 and 2.9 standards. Although the phrase "in the area in which the waters are located" is not specified, it must be interpreted in light of the geographic area in which the majority of the facility's workers live and in which the facility contributes to the community tax base. A HUC-10 watershed is simply too large a geographic scale to assure generally that the community affected by the increased loading will realize a social or economic benefit. What is "beneficial" for the watershed is not necessarily beneficial for the community "in the area in which the waters are located." A social or economic benefit "in the area" could be assured only if the increased loading occurred in close proximity to the decrease in loading, or generally if the increased loading occurred in close proximity to an improvement in water quality created by the trade. But draft Section 5(b)(5) is not narrowly tailored to those circumstances and would include activities that do not meet that criterion.

As EPA has stated regarding these watershed-scale trading exemptions [designated 327 IAC 2-1.3-4(b)(3)(B) and 327 IAC 2-1.3-4(b)(4)(A) in the previous draft rule],

> [These exemptions] contemplate offsetting new or increased discharges with other actions within the same ten digit HUC. Offsetting provisions may be an acceptable basis for determining that antidegradation review is not triggered if it is clear that the offset results in no change in water quality at the point where the new or increased discharge will occur. It is not clear that the spatial relationship between such actions will be such as to ensure that this requirement will be met in all circumstances that would qualify for this exemption. EPA recommends that these exemption provisions for these actions be removed from the antidegradation rule and addressed through the antidegradation review process on a case-by-case basis or provide the data and analysis necessary to satisfy the antidegradation demonstration requirement for all the activities that might fall under one of these exemptions.

LSA Document #08-764 RTC Second Comment Period, page 7. IDEM's response to EPA's above comment was nonresponsive because requiring "some level of an antidegradation demonstration" – i.e., the alternatives analysis of draft Section 5(c) – does not solve the problems with these exemptions, and EPA was not referring to Section 4 of the "revised draft" we are now discussing. As we pointed out at the meeting, good pollution trades cannot be distinguished from bad trades without the information from the socioeconomic analysis component of the antidegradation demonstration.

Draft Section 5(b)(1) also describes pollution trades across a HUC-10 watershed. At the meeting you discussed a specific scenario covered by this exemption for which you believed the socioeconomic information in the antidegradation demonstration has already been submitted as part of the permitting process. But it appears that Section 5(b)(1) is not narrowly tailored to that specific scenario you mentioned, and instead appears designed as a catch-all for various

activities, some of which may not be justified by existing information on socioeconomic importance.

Finally, draft Section 5(d)(2) allows, without a socioeconomic justification, a significant decrease in water quality to occur if the new or increased loading is necessary to accomplish a reduction in the release of one or more air pollutants, and if the reduction in the loading of the air pollutant will substantially reduce human exposure to an air pollutant subject to state or federal air quality standards. Air pollutants subject to federal national ambient air quality standards are carbon monoxide, sulfur dioxide, ozone, lead, nitrogen dioxide, and particulate matter. This exemption thus assumes a "significant" lowering of water quality will always create a social or economic benefit if there is a corresponding "significant" reduction in one of those air pollutants, irrespective of the fact that Indiana is in compliance with the air standards for those pollutants. You did not refer us to any factual information, nor are we aware of any, that would justify that assumption. How can we assume that a further reduction in an air pollutant that already meets air quality standards provides an incremental benefit sufficient to outweigh a significant reduction in water quality? As with draft Sections 5(b)(5) and 5(b)(1), this exemption describes activities that require a full demonstration of economic or social importance on a case-by-case basis in order to distinguish good from bad pollution trades.

Takeaway:

- Eliminate exemptions 5(b)(5), 5(b)(1), and 5(d)(2) in order to ensure that trading proposals are appropriately evaluated for their overall socioeconomic benefit before being approved.

DISCUSSION ITEM 9. BADCT: SECTION 5(E)

IDEM has been proposing the use of a technology-based treatment limit as a way to expedite and simplify a full evaluation of technology alternatives since the beginning of this rulemaking process. The theory is that there would be no need to conduct a rigorous professional evaluation of different treatment options if the applicant simply selects effluent limits based on the best treatment technology commonly available. Although we do not dispute this in theory, we have had several concerns about how this would be implemented in practice.

One concern is that the BADCT option not be used to replace a full consideration of whether or not degradation is "necessary" in the first place. In other words, an applicant should not proceed to the choice of treatment options until he or she has first ruled out the feasibility of nondegradation and mitigation techniques or alternatives. In our meeting, you clarified that the rule has been modified to require this demonstration of "necessity" in Section 5(c) before the treatment alternatives (and BADCT option) are considered in Section 5(e). We welcome this revision and note that it does indeed appear to satisfy this concern.

Another concern we discussed at our meeting was that there needs to be some process in place to regularly review and update BADCT limits to ensure that the limits continue to reflect the best control technology available as treatment technology continues to improve. We understand that IDEM intends to address this in guidance or in the rule submissions to EPA.

Although we did not discuss this point during our meeting, we continue to believe that it is important to set a BADCT limit for phosphorus discharges from POTWs, especially now that the definition of "regulated pollutant" now explicitly includes nutrients. We note that POTWs discharging in the Great Lakes Basin (including Indiana POTWs) have been meeting a limit of 1.0 mg/L phosphorus for decades and more stringent limits are certainly technically feasible.

Takeaways:

- Clarify the process that IDEM will use to ensure that BADCT limits are regularly reviewed and updated as necessarily to keep up with technological innovation.

- Clarify the process that IDEM will use to ensure that BADCT limits are set for an appropriate range of pollutants, including phosphorus.

Indiana Chamber
The Voice of Indiana Business.®

December 30, 2011

Mary Ann Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Avenue
Mail Code 65-45
Indianapolis, Indiana 46204-2251

Subject: **LSA Document #08-764 – Notice of Comment Period**
Development of New Rules and Amendments to Rules Concerning Antidegradation Standards and Implementation Procedures

Dear Ms. Stevens:

On behalf of the members of the Indiana Chamber of Commerce, this letter provides comments on LSA #08-764, Development of New Rules and Amendments to Rules Concerning Antidegradation Standards and Implementation Procedures. The Indiana Chamber is the state's largest broad-based business advocacy organization, with nearly 5,000 members that employ more than 800,000 Hoosiers in all 92 counties. The Indiana Chamber has served the business community since 1922.

The Indiana Chamber appreciates all the time and energy invested by IDEM's staff and the many businesses and industries that have likewise spent significant time on this important rule. A major concern of the Indiana Chamber is that the current language allows the agency administering this rule significant discretion. While the current administration may use this discretionary power in a rational manner, another administration in future years may not be so reasonable. An inappropriate implementation of this rule could severely restrict future economic development in Indiana, without resulting in any significant benefit to water quality. In addition, this rule could compromise the competitiveness of existing industries by limiting their ability to expand operations or change technologies.

Overall, it seems that what is needed is clarity about 1) when does an antidegradation review need to be performed, 2) what level of detailed information is adequate and 3) how will IDEM decide to approve the demonstration or require additional controls that may be necessary to reduce or prevent an increase in loading.

To this point, preliminarily adopted rule has the following major issues that need to be addressed before final adoption.

1. Section 1(b) of the proposed rule is much broader than the Legislature intended when it passed Indiana Code 13-18-3-2(k) & (l) and much more stringent than what is required under EPA's implementing regulations and guidance. As written, Section 1(b) of the proposed rule is much too broad and vague, and is likely to lead to lawsuits from competing interpretations of rule applicability in the future. The applicability provision should be clear and simple so that all entities are able to discern applicability. Applicability of the antidegradation rule should be limited to only those instances where there is a new or increased loading of a regulated

pollutant for which a new or increased permit limit is required. This is consistent with Indiana Code 13-18-3-2(k) & (l) and federal regulations. Further it is sufficient to ensure that existing use designations will be protected and high quality waters will remain "fishable and swimmable." Section 1(b) should be revised as follows:

> (b) The antidegradation implementation procedures established in sections 4 through 7 of this rule apply to a proposed new or increased loading of a regulated pollutant to surface waters of the state for which a new or increased permit limit is required.

2. The definition of "Significant lowering of water quality" in the proposed rule is inconsistent with the requirements in Indiana Code 13-18-3-2(l)(1)(A) which limits antidegradation review to new or increased loadings "for which a new or increased permit limit is required." A suggested wording change to address this issue is (note added words noted in ***bold italics***):

> Significant lowering of water quality" means: (A) there is a new or increased loading of a regulated pollutant to a surface water of the state ***for which a new or increased permit limit is required*** that results in an increase in the ambient concentration of the regulated pollutant and the increased loading is greater than a *de minimis* lowering of water quality; and (B) none of the provisions of section 4 of this rule applies.

3. The draft rule at 327 IAC 2-1.3-4(c)(1)(a)(ii)&(iii) includes a concept of a "benchmark available loading capacity" that is much more stringent than what is required by Indiana Code 13-18-3-2 and federal regulation. The EPA has approved other states' regulations with no such cap and we encourage IDEM to remove this section from the rule. If IDEM insists on including Section 4(c)(1)(A)(ii) and (iii), then it should be revised to include a reasonable benchmark loading capacity (e.g. 50% of the available unused loading capacity). Ensuring that *de minimis* permitted increases do not reduce the unused loading capacity of the stream below 50% will provide more than enough buffer to ensure protection of exisitng use designations and to ensure that a significant lowering of water quality does not occur.

4. In addition, Section 4(c)(1)(A)(ii) and (iii) as currently written insinuates that the benchmark loading capacity as calculated during the initial request will remain indefinitely, even if changes occur to the waterbody that result in increased unused loading capacity. Thus, if the initial request consumes a loading capacity up to the benchmark loading capacity, then no future increases – no matter how small – will be permitted without going through antidegradation review. There is no reason to "lock in" the initial benchmark loading capacity and ignore changes that may occur to the stream that increase unused loading capacity. For instance, if a discharge is eliminated or reduced upstream there will be a greater assimilative loading capacity downstream. A discharger downstream should be able to take advantage of this new assimilative loading capacity by recalculating the benchmark loading capacity. Allowing so will not result in a significant lowering of water quality. Therefore, if the concept of a benchmark loading capacity remains in the rule it should be revised to allow the benchmark loading capacity to be re-calculated if conditions in the waterbody change.

5. The concept of a water quality improvement project as stated in Section 7 of the proposed rule is contrary to the clear intent of IC 13-18-3-2(k) and (l). The legislative language (and the legislative committee discussions leading up to enactment of the statute) was premised on the concept that the water quality improvement project or fund was established as the basis for satisfying the requirements of an antidegradation demonstration for a significant lowering of water quality subject to an implied understanding that the lowering of water quality was

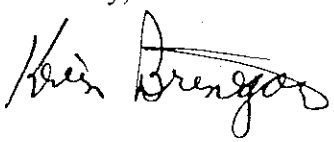
"necessary." This is evidenced by the wording in IC 13-18-3-2(k)(2) that the rule procedures will "allow for increases and additions in pollutant loadings … if (A) there will be an overall improvement in water quality."

It is acknowledged that the legislation also references that (i) the procedures will be designed to "prevent degradation" (IC 13-18-3-2(k)(1)) and (ii) in addition to providing for an overall improvement in water quality, the proposal for increases and additions in pollutant loadings also is to satisfy the applicable antidegradation standards of 327 IAC 2-1 and 2-1.5. Notwithstanding these references to elements of antidegradation procedure, the fact remains that the understanding, as well as the clear intent of the statutory language, has always been that the performance or funding of a water quality improvement project will be the primary basis of gaining approval for the increased loading by a discharger to an OSRW. However, the proposed rule is not consistent with this understanding.

As written, the proposed Section 7 requires the water quality improvement project be performed or funded in addition to an antidegradation demonstration. However, Section 5 does not clearly implement the understanding referenced above and could leave a discharger proposing a water improvement project facing an obligation to prepare a full antidegradation demonstration including the elements of subsections 5(f) and (g). While the provision of subsection 5(b)(5) of the proposed rule appears to address the situation in which a discharger actually implements a water improvement project in the watershed of the OSRW, it would be preferable for the proposed language to actually reference the water improvement project concept of IC 13-18-3-2(k) and (l) as an example. More problematically, proposed subsection 5(b)(5) does not encompass the option for a discharger under IC 13-18-3-2(l) to pay the water improvement fee in lieu of actually performing a project. Under this latter scenario, the net decrease in loading of the regulated pollutant to the OSRW watershed will not necessarily occur simultaneously with the increased loading by the discharger. To correct this oversight, Section 5(b) should be revised to expressly provide that a project involving payment of a water improvement fee pursuant to IC 13-18-3-2(l) is included within the scope of subsection 5(b). With these revisions, a proposed increase in loading to an OSRW involving a water improvement project implementation or fee payment will satisfy the antidegradation demonstration requirements with submittal of the basic information of Section 5(a) and the "necessary" information of Section 5(c).

Thank you for your consideration of these comments. If you have any questions, please feel free to contact me.

Sincerely,



Kevin M. Brinegar
President and CEO
Indiana Chamber of Commerce
115 W. Washington St., Suite 850 South
Indianapolis, IN 46206
(317) 264-3110

STEVENS, MARY ANN

From: Patrick, Rebecca [rpatrick@indianachamber.com]
Sent: Friday, December 30, 2011 11:52 AM
: STEVENS, MARY ANN
: Griffin, Vince
Subject: LSA Document #08-764 – Notice of Comment Period INDIANA CHAMBER
Attachments: Antideg Rule Comments to IDEM Indiana Chamber.doc

Importance: High

December 30, 2011

Mary Ann Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management 100 North Senate Avenue Mail Code 65-45
Indianapolis, Indiana 46204-2251

Subject: LSA Document #08-764 – Notice of Comment Period
Development of New Rules and Amendments to Rules Concerning Antidegradation Standards and Implementation Procedures

Dear Ms. Stevens:

On behalf of the members of the Indiana Chamber of Commerce, this letter provides comments on LSA #08-764, Development of New Rules and Amendments to Rules Concerning Antidegradation ndards and Implementation Procedures. The Indiana Chamber is the state's largest broad-based siness advocacy organization, with nearly 5,000 members that employ more than 800,000 Hoosiers in all 92 counties. The Indiana Chamber has served the business community since 1922.

The Indiana Chamber appreciates all the time and energy invested by IDEM's staff and the many businesses and industries that have likewise spent significant time on this important rule. A major concern of the Indiana Chamber is that the current language allows the agency administering this rule significant discretion. While the current administration may use this discretionary power in a rational manner, another administration in future years may not be so reasonable. An inappropriate implementation of this rule could severely restrict future economic development in Indiana, without resulting in any significant benefit to water quality. In addition, this rule could compromise the competitiveness of existing industries by limiting their ability to expand operations or change technologies.

Overall, it seems that what is needed is clarity about 1) when does an antidegradation review need to be performed, 2) what level of detailed information is adequate and 3) how will IDEM decide to approve the demonstration or require additional controls that may be necessary to reduce or prevent an increase in loading.

To this point, preliminarily adopted rule has the following major issues that need to be addressed before final adoption.

Section 1(b) of the proposed rule is much broader than the Legislature intended when it passed ana Code 13-18-3-2(k) & (l) and much more stringent than what is required under EPA's implementing regulations and guidance. As written, Section 1(b) of the proposed rule is much too

broad and vague, and is likely to lead to lawsuits from competing interpretations of rule applicability in the future. The applicability provision should be clear and simple so that all entities are able to discern applicability. Applicability of the antidegradation rule should be limited to only those instances where there is a new or increased loading of a regulated pollutant for which a new or increased permit limit is required. This is consistent with Indiana Code 13-18-3-2(k) & (l) and federal regulations. Further it is sufficient to ensure that existing use designations will be protected and high quality waters will remain "fishable and swimmable." Section 1(b) should be revised as follows:
(b) The antidegradation implementation procedures established in sections 4 through 7 of this rule apply to a proposed new or increased loading of a regulated pollutant to surface waters of the state for which a new or increased permit limit is required.

1. The definition of "Significant lowering of water quality" in the proposed rule is inconsistent with the requirements in Indiana Code 13-18-3-2(l)(1)(A) which limits antidegradation review to new or increased loadings "for which a new or increased permit limit is required." A suggested wording change to address this issue is (note added words noted in bold italics):
Significant lowering of water quality" means: (A) there is a new or increased loading of a regulated pollutant to a surface water of the state for which a new or increased permit limit is required that results in an increase in the ambient concentration of the regulated pollutant and the increased loading is greater than a de minimis lowering of water quality; and (B) none of the provisions of section 4 of this rule applies.

1. The draft rule at 327 IAC 2-1.3-4(c)(1)(a)(ii)&(iii) includes a concept of a "benchmark available loading capacity" that is much more stringent than what is required by Indiana Code 13-18-3-2 and federal regulation. The EPA has approved other states' regulations with no such cap and we encourage IDEM to remove this section from the rule. If IDEM insists on including Section 4(c)(1)(A)(ii) and (iii), then it should be revised to include a reasonable benchmark loading capacity (e.g. 50% of the available unused loading capacity). Ensuring that de minimis permitted increases do not reduce the unused loading capacity of the stream below 50% will provide more than enough buffer to ensure protection of exisitng use designations and to ensure that a significant lowering of water quality does not occur.
2. In addition, Section 4(c)(1)(A)(ii) and (iii) as currently written insinuates that the benchmark loading capacity as calculated during the initial request will remain indefinitely, even if changes occur to the waterbody that result in increased unused loading capacity. Thus, if the initial request consumes a loading capacity up to the benchmark loading capacity, then no future increases – no matter how small – will be permitted without going through antidegradation review. There is no reason to "lock in" the initial benchmark loading capacity and ignore changes that may occur to the stream that increase unused loading capacity. For instance, if a discharge is eliminated or reduced upstream there will be a greater assimilative loading capacity downstream. A discharger downstream should be able to take advantage of this new assimilative loading capacity by recalculating the benchmark loading capacity. Allowing so will not result in a significant lowering of water quality. Therefore, if the concept of a benchmark loading capacity remains in the rule it should be revised to allow the benchmark loading capacity to be re-calculated if conditions in the waterbody change.
3. The concept of a water quality improvement project as stated in Section 7 of the proposed rule is contrary to the clear intent of IC 13-18-3-2(k) and (l). The legislative language (and the legislative committee discussions leading up to enactment of the statute) was premised on the concept that the water quality improvement project or fund was established as the basis for satisfying the requirements of an antidegradation demonstration for a significant lowering of water quality subject to an implied understanding that the lowering of water quality was "necessary." This is evidenced by the wording in IC 13-18-3-2(k)(2) that the rule procedures will "allow for increases and additions in pollutant loadings ... if (A) there will be an overall improvement in water quality."
It is acknowledged that the legislation also references that (i) the procedures will be designed to "prevent degradation" (IC 13-18-3-2(k)(1)) and (ii) in addition to providing for an overall

improvement in water quality, the proposal for increases and additions in pollutant loadings also is to satisfy the applicable antidegradation standards of 327 IAC 2-1 and 2-1.5. Notwithstanding these references to elements of antidegradation procedure, the fact remains that the understanding, as well as the clear intent of the statutory language, has always been that the performance or funding of a ater quality improvement project will be the primary basis of gaining approval for the increased ading by a discharger to an OSRW. However, the proposed rule is not consistent with this understanding.

As written, the proposed Section 7 requires the water quality improvement project be performed or funded in addition to an antidegradation demonstration. However, Section 5 does not clearly implement the understanding referenced above and could leave a discharger proposing a water improvement project facing an obligation to prepare a full antidegradation demonstration including the elements of subsections 5(f) and (g). While the provision of subsection 5(b)(5) of the proposed rule appears to address the situation in which a discharger actually implements a water improvement project in the watershed of the OSRW, it would be preferable for the proposed language to actually reference the water improvement project concept of IC 13-18-3-2(k) and (l) as an example. More problematically, proposed subsection 5(b)(5) does not encompass the option for a discharger under IC 13-18-3-2(l) to pay the water improvement fee in lieu of actually performing a project. Under this latter scenario, the net decrease in loading of the regulated pollutant to the OSRW watershed will not necessarily occur simultaneously with the increased loading by the discharger. To correct this oversight, Section 5(b) should be revised to expressly provide that a project involving payment of a water improvement fee pursuant to IC 13-18-3-2(l) is included within the scope of subsection 5(b). With these revisions, a proposed increase in loading to an OSRW involving a water improvement project implementation or fee payment will satisfy the antidegradation demonstration requirements with submittal of the basic information of Section 5(a) and the "necessary" information of Section 5(c).

Thank you for your consideration of these comments. If you have any questions, please feel free to ntact me.

Sincerely,

Kevin M. Brinegar
President and CEO
Indiana Chamber of Commerce
115 W. Washington St., Suite 850 South
Indianapolis, IN 46206
(317) 264-3110

J. Nathan Noland, President

Office (317) 638-6997
Fax (317) 638-7031
admin@indianacoal.com

INDIANA COAL COUNCIL, INC.
150 West Market Street, Suite 400
Indianapolis, IN 46204
www.indianacoal.com

December 28, 2011

Ms. Martha Clark Mettler
Deputy Assistant Commissioner
Office of Water Quality
Indiana Department of Environmental Management
Indiana Government Center North Room 1255
100 North Senate Avenue
Indianapolis, IN 46204

Re: IDEM Antidegradation Standards and Implementation Procedures Proposed Rule as Publicly Noticed on December 9, 2011

Dear Ms. Mettler:

These comments are submitted on behalf of the Indiana Coal Council, Inc. ("ICC") with respect to the Antidegradation Standards and Implementation Procedures Proposed Rule as publicly noticed on December 9, 2011 ("3rd Notice"). The ICC is a trade association representing Indiana coal producers and related entities. Members of the ICC will be impacted by this proposed rule. The ICC appreciates the opportunity to participate in the development of the rulemaking for Antidegradation Standards and Implementation Procedures in Indiana. It is critical in this time of energy demand that IDEM develop antidegradation standards and implementation procedures that are reasonable in balancing protection of water quality and promotion of economic development opportunity and are clear in their meaning and operation.

The draft of the Antidegradation Standards and Implementation Procedures, as proposed by IDEM on May 9, 2011 and revised in the September 14, 2011 Proposed Rule reflecting interim recommendations of Board Members Gary Powdrill and David Wagner, contains welcomed clarifications. The December 9, 2011 draft of the rule reflects progress in the development of the program. The ICC continues to urge additional refinement of the rule. The ICC has participated through oral and written comments and again welcomes the opportunity to provide additional written comments.

General Permitting Issues. The ICC appreciates the efforts by IDEM to respond to the questions concerning the next phase of the development of an administrative NPDES general

permitting program. IDEM represents that it has begun the process of converting Indiana's general permits from a permit-by-rule format to entirely administratively issued general permits. Antidegradation requirements will be considered throughout the process, and we assume from the response to comments that IDEM will conduct the appropriate level of antidegradation review on each administratively issued general permit. If the administratively issued general permit satisfies the antidegradation requirements, then any NOI that satisfies the general permit requirements will also satisfy the antidegradation requirements. Administratively issued general permits will be renewed/re-issued every five years.

ICC suggests that in order to provide appropriate clarification to the casual reader with regard to the preparation of an antidegradation demonstration as provided under 327 IAC 2-1.3-5-1(b) and the role of the exemptions that the following be inserted:

> 5(b) An antidegradation demonstration, not exempt under Section 4 of this rule, that includes the basic information...

Antidegradation Trigger. IDEM's proposed implementation procedures do not limit antidegradation review to only permits subject authorizations pursuant to the Clean Water Act. IDEM is unnecessarily creating a complex rule to both implement and to understand. In addition, IDEM's use of a de minimis "trigger" rather than a "trigger" based on a new or increased permit limit is overly broad and more stringent than necessary to comply with the Clean Water Act and current U.S. Environmental Protection Agency ("USEPA") guidance. IDEM is not required to set a de minimis trigger by EPA law or policy and the ICC joins other organizations in urging that IDEM instead base its antidegradation implementation procedures upon the need for a permit revision pursuant to the CWA .

A review of other states' programs accepted by USEPA confirms that the agency's regulations do not mandate that the antidegradation "trigger" be based on any de minimis levels of water quality changes, but rather allows for sufficient flexibility for states to base such a trigger on the need for a new or increased permit limit that contributes to a lowering of water quality. Many states use a trigger based on NPDES permitting; including: Illinois (302.105(c)(2). and Ohio (3745-1-05(B)):

If IDEM bases its antidegradation program on any lowering of water quality beyond di minimis levels and fails to tie its review to NPDES permitting (or specific components of the Clean Water Act), its program would lack specificity and require unnecessary, expensive antidegradation reviews that will have ill-defined goals. Therefore, it is suggested that IDEM modify Section 1.3.1(b) Antideg #08-764 Proposed Rule by specifically tying the "trigger" for the antidegradation program review to permitting under the Clean Water Act as follows:

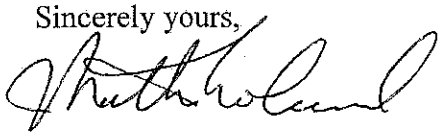
(b) The antidegradation implementation procedures established in sections 4 through 7 of this rule apply to a proposed new or increased loading of a regulated pollutant to surface waters of the state from a ~~deliberate~~ permitted activity subject to the Clean Water Act sections , 402, including a change in process or operation requiring a permit modification, permit issuance, or permit reissuance that will result in a significant lowering of water quality.

This modification to the proposed rule will provide clarity and specific guidance as to when an antidegradation review is required.

Narrative Criteria. The term "regulated pollutant," continues to leave unanswered the question as to how narrative criteria will be applied. The ICC joins others in the regulated community in suggesting that the rule provide that a regulated pollutant be any numerically expressed parameter for which water quality criteria have been adopted. IDEM has responded to comments by stating that it understands that narrative criteria will not be used in calculating degradation under de mimimis. With that being said, the agency should conclude that the de minimus exercise is unnecessarily complex as evidenced by the awkward narrative criteria application discussion. IDEM needs to clarify the use of numerically expressed narrative criteria only and eliminate the de minimis exercise entirely.

Finally, as Indiana considers its antidegradation implementation program it is essential that IDEM recognize the level of complexity of this proposed rule relative to other states in the region. For example, the necessity and alternatives analyses as proposed for Indiana is considerably more difficult to implement than that in Illinois or Kentucky. These types of details, as well as other examples, result in a competitive disadvantage for Indiana. The ICC wants Indiana to have an antidegradation implementation program that is good for Indiana's environment and its energy industry.

Sincerely yours,



J. Nathan Noland

Indiana ENERGY Association

1600 ONE AMERICAN SQUARE, BOX 82065 INDIANAPOLIS, INDIANA 46282 317-632-4406 FAX 317-262-4940 www.indianaenergy.org

OFFICIAL COMMENT

December 30, 2011

LSA Document #08-764 (Antidegradation)
MaryAnn Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Avenue
MC 65-45
Indianapolis, IN 46204-2251

Re: LSA Document #08-764 (Antidegradation)

Dear Ms. Stevens,

Attached, please find comments submitted by the Indiana Utility Group (IUG) regarding the above named matter. I will forward you an electronic version of our file stamped comments as well.

Thank you for your assistance. If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

Stan Pinegar

Stan Pinegar
On behalf of the Indiana Utility Group

Indiana ENERGY Association

1600 ONE AMERICAN SQUARE, BOX 82065 INDIANAPOLIS, INDIANA 46282 317-632-4406 FAX 317-262-4940 www.indianaenergy.org

December 30, 2011

MaryAnn Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Avenue
MC-65-45
Indianapolis, IN 46204-2251

Re: IDEM Antidegradation Standards and Implementation Procedures Proposed Rule (LSA Document #08-764) as Publicly Noticed on December 9, 2011

Dear Ms. Stevens:

I offer these comments on behalf of the Indiana Utility Group with respect to the Proposed Rule for Antidegradation Standards and Implementation Procedures as preliminary adopted by the Water Pollution Control Board on September 14, 2011 ("Proposed Antidegradation Rule" or, simply, "Proposed Rule") and publicly noticed on December 9, 2011 ("3rd Notice"). The IUG's members include the 14 electric and gas utility members of the Indiana Energy Association as well as Dominion State Line Energy, Indiana Kentucky Electric Corporation, Wabash Valley Power, and Hoosier Energy REC, Inc. The IUG appreciates the opportunity to participate in the development of the rulemaking for Antidegradation Standards and Implementation Procedures in Indiana. It is critical in this time of transition for the electric power industry that IDEM develop antidegradation standards and implementation procedures that are (i) reasonable in balancing protection of water quality and promotion of economic development opportunity, (ii) clear in their meaning and operation, and (iii) not more restrictive than other USEPA Region V states.

The draft of the Antidegradation Standards and Implementation Procedures, as proposed by IDEM on May 9, 2011 and revised in the September 14, 2011 Proposed Rule reflecting interim recommendations of Board Members Gary Powdrill and David Wagner, contains welcomed clarifications, such as those concerning "threatened and endangered species", "available loading capacity," and "used loading capacity." The December 9, 2011 draft of the rule is an example of the benefit of receiving input from others in an effort to generate a well-defined Indiana Antidegradation Program. The IUG continues to urge additional refinement of the rule as the administrative rulemaking process proceeds. IUG has participated through oral and written comments and again welcomes the opportunity to provide additional written comments. IUG believes that further improvements to the proposed rule must be made during the next

phase of the rulemaking to achieve the appropriate legal thresholds required for implementation. The IUG will continue to participate in this review process and highlights our recommended changes as follows.

IUG SUMMARY COMMENTS TO IDEM RESPONSE TO COMMENTS

IUG appreciates the time and effort that is committed to responding to comments in writing as has been done by IDEM. On page 84 of the December 9, 2011 proposal there is a specific response to IUG comments. To follow-up on those responses, we offer the following brief statements of IUG's continuing concern and direct the agency to the more comprehensive comments contained in this letter:

- When to start antidegradation review? IDEM offered that to comply with the Clean Water Act the antidegradation procedures must apply to all waters of the state. IUG would offer in reply that by having as a trigger the §402 permitting program designed to protect all waters of the state IDEM should be convinced the antidegradation program is comprehensive.

- Which discharges? IDEM stated that it believes that the basic elements of the antidegradation implementation as laid out in the rule are workable for both NPDES discharges and other actions that impact water quality – it is not necessary to address them separately. IUG responds by agreeing that the implementation procedures do not necessarily have to explain all details, but there may well be significant differences in how some aspects of the implementation procedures will or should apply to NPDES discharges versus other actions with water quality impacts. It is important for the regulated community to have enough notice of the scope of the program and its proposed operation to understand how the agency intends to implement in major contexts and how that will impact the obligations under existing law.

- Narrative criteria: How to say narrative and mean numerical? IDEM believes it is appropriate to include narrative criteria in the definition of regulated pollutant because there are pollutants that do not currently have a numeric water quality standard that merit regulatory review, but in its response to comments, the agency defined criterion or criteria as "a definitive numeric value." IDEM recognizes that narrative water quality criteria cannot be used to establish a de minimis lowering of water quality because a numeric value is necessary to develop the available loading capacity. However, in practice, for NPDES permits, the narrative criteria of Indiana's water quality standards are protected through the establishment of numeric effluent limits. These numeric limits are based on an applied wastewater treatment technology such as an oil/water separator or a sedimentation system. IUG responds by stating that the de minimis concept is a an unnecessary complication to the rule as evidenced by the tortured treatment of narrative criteria.

- Toxic or not? IDEM believes the definition of toxic substance is appropriate. IUG continues to urge a definition that has meaning and strongly objects to the language of that which "are or may become toxic." U.S. EPA has a defined list based upon a balance of factors that result in a definitive determination of a toxic substance to include: "toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms, and the nature and extent of the effect of the toxic pollutant on such organisms." CWA Section 307(a)(1). IDEM has yet to offer a rational or scientific basis as to why EPA's list is not definitive or why IDEM cannot engage in the rulemaking process to create a list of its own if needed.

- Are social or economic needs of other regions important? IDEM comments that the language of the statute suggests that "Inclusion by the applicant of additional factors that may enhance the social or economic importance associated with the proposed discharge, such as an approval that recognizes social or economic importance and is given to the applicant by: (i) a legislative body; or (ii) other governmental officials" should satisfy IUG that its members may assert a regional economic impact if it chose to do so. IUG responds by suggesting that, since IDEM recognizes that regional impacts can be considered, then the rule should expressly state this, especially given that this factor is likely to arise with some frequency.

- Antidegradation Demonstrations vs. Temperature Variance Demonstrations: Which is Most Comprehensive and Protective? IDEM acknowledged in the response to comments that "316(a) variances should not be subject to antidegradation review"; however, the draft rule still excludes such variances from waters designated as ONRWs. IDEM then states that the antidegradation standard is consistent with the federal regulation. IUG responds by referring IDEM to the history of 316(a) as set forth in previous written comment and in the literature.

IUG COMPREHENSIVE COMMENTS

1. THE SCOPE OF APPLICABILITY FOR THE PROPOSED RULE'S ANTIDEGRADATION IMPLEMENTATION PROCEDURES IS OVERLY BROAD

Indiana's proposed implementation procedures do not limit antidegradation review to only actions requiring a new or modified NPDES permit subject to section 402 (NPDES) of the Clean Water Act. Instead, Section 1(b) of proposed 327 IAC 2-1.3 would apply the implementation procedures to any proposed deliberate activity subject to the Clean Water Act that would result in a

new or increased loading of a regulated pollutant. However, the actual implementation procedures of Sections 4 and 5 of the Proposed Rule appear to be almost entirely based on the context of an NPDES discharger. Therefore, not only is the scope of applicability of the proposed implementation procedures vague, leaving open to question which activities would be subject to antidegradation review, but the Proposed Rule lacks meaningful implementation procedures for activities apart from those subject to NPDES permit requirements.

IUG urges that the scope of applicability for the proposed antidegradation implementation procedures be stated at this time in terms of "any new or increased loading of a regulated pollutant to surface waters of the state from an activity requiring issuance of a new or modified NPDES permit that will result in a significant lowering of water quality."

A review of other states' programs accepted by USEPA confirms that the agency's regulations do not mandate that antideg implementation be applied to any activity with water quality impacts , but rather allows for sufficient flexibility for states to base such a trigger on the need for a new or increased permit limit that contributes to a lowering of water quality. The Water Quality Standards Handbook (2d Ed., 1994) (the "Handbook") offers the following statement about when Tier 2 antidegradation review is required:

> *The Antidegradation review requirements of [40 C.F.R. § 131.2(a)(2)] are triggered by any action that would result in the lowering of water quality in a high-quality water. Such activities as new discharges or expansion of existing facilities would presumably lower water quality and would not be permissible unless the State conducts a review consistent with [the regulations]. In addition, no permit may be issued, without an Antidegradation review to a discharger to high-quality waters with effluent limits greater than actual current loadings if such loadings will cause a lowering of water quality.*

Thus USEPA guidance suggests it is appropriate to tie antidegradation review to permit issuance and/or modification. Many states use a trigger based on NPDES permitting; including:

- Maryland: *"general. An applicant for proposed amendments to county plans or discharge permits for discharge to Tier II waters that will result in a new, or an increased, permitted annual discharge of pollutants and a potential impact to water quality..."* COMAR 26.08.02.04-1(B).

- Mississippi: *"A report regarding compliance with the antidegradation policy shall be conducted for all new or expanding wastewater discharges into Mississippi surface waters that require an NPDES permit. NPDES Permit reissuances will not be subject to the report procedures provided there are no proposed changes to the facility's effluent which would result in increased in pollutant loadings..."* Mississippi's implementation procedures pp. 4-5.

Similarly, other states in USEPA Region 5 tie applicability of the antidegradation review process to permitting under the 402 program of the Clean Water Act. See, for example:

- Illinois: *"A proposed increase in pollutant loading that necessitates a new, renewed or modified NPDES permit. . . ."* 302.105(c)(2).

If IDEM bases its antidegradation program on any lowering of water quality beyond *de minimis* levels and fails to tie its review to the NPDES permitting context arising under Section 402 of the Clean Water Act, its program will become unduly difficult to implement both from a purely substantive numerical analysis and from a cost perspective, all with no clear defined environmental benefit. As proposed this rule is not at all user friendly and will require very skilled technical expertise to evaluate the de minimis formula. It is suggested that IDEM modify Section 1(b) of the Proposed Rule to specifically tie the "trigger" for the antidegradation program review to permitting requirements under section 402 of the Clean Water Act as follows:

> *(b) The antidegradation implementation procedures established in sections 4 through 7 of this rule apply to a proposed new or increased loading of a regulated pollutant to surface waters of the state from an ~~deliberate~~ activity requiring permitting under ~~subject to~~ section 402 of the Clean Water Act that will result in a significant lowering of water quality.*

This modification to the proposed rule will provide clarity and specific guidance as to when an antidegradation review is required and what the antidegradation review will entail.

2. THE TERM "REGULATED POLLUTANT" CONTINUES TO LEAVE UNANSWERED THE QUESTION AS TO HOW NARRATIVE CRITERIA WILL BE APPLIED.

The term "regulated pollutant," continues to leave unanswered the question as to how narrative criteria will be applied. This uncertainty represents a number of legal problems. The legal burden of the agency to provide a rule that is neither arbitrary nor capricious is a significant one. The IUG suggested that the rule provide that a regulated pollutant be any numerically expressed parameter for which water quality criteria have been adopted. The agency has responded that U.S. EPA and surrounding states have included narrative criteria and therefore so should Indiana. IUG supports such inclusion, but asserts that it is entirely unreasonable for the agency to not qualify the rule such that it will apply only to those narrative criteria for which a numeric value has been developed to represent its expression or implementation. This will allow objective implementation of such criteria in this context, including implementation of the concept of *de minimis* lowering of water quality. This is issue is so germane to the entire implemetation procedures it is too important an issue to be left unstated for subsequent treatment only in guidance.

In addition to the main concern about the manner in which a narrative criterion may be the basis of a "regulated pollutant", the proposed definition contains an organizational awkwardness in which criteria and pollutants are lumped together inappropriately.

IUG urges that the definition of "regulated pollutant" be revised to read:

(44) "Regulated pollutant" means ~~any~~:
(A) **any** parameter**, substance, or other constituent or characteristic** of a pollutant, as defined in subdivision (39):
(i) for which water quality criteria have been adopted in or developed pursuant to 327 IAC 2-1 or 327 IAC 2-1.5;
(**AA**~~ii~~) including ~~(AA)~~ narrative and numeric criteria; and
(BB) **excluding biological criteria**; ~~nutrients, specifically phosphorus and nitrogen; and~~
(ii) **including nutrients, specifically phosphorus and nitrogen; and**
(iii) excluding:
(AA) ~~biological criteria~~ **pH**; **and**
(BB) **dissolved oxygen** ~~pH~~; and
~~(CC) dissolved oxygen; and~~
(B) **any** other parameter**, substance, or other constituent or characteristic** of a pollutant, as defined in subdivision (39), that may be limited in an NPDES permit as a result of, but not limited to:
(i) best professional judgment;
(ii) new source performance standards;
(iii) best conventional pollutant control technology;
(iv) best available technology economically achievable; or
(v) best practicable control technology currently available;

for the appropriate categorical guidelines of 40 CFR 400 to 40 CFR 471;
(C) regardless of paragraph (A) of this definition, a "regulated pollutant" may not include or be based on a narrative water quality criterion unless a numeric value subject to reproducible, objective measurement has been established, through rulemaking, for a parameter, substance or other constituent or characteristic of a pollutant to express or implement the narrative criterion.

IUG applauds the removal of "pollutant of concern" in this proposed rule.

3. THE RULE CONTINUES TO LEAVE THE DEFINITION FOR "TOXIC SUBSTANCES" VAGUELY DESCRIBED AS SUBSTANCES THAT "ARE OR MAY BECOME HARMFUL."

In addition, the Proposed Rule continues to vaguely define the term "toxic substances" as "substances that are or may become harmful." IDEM explains in its response to comments that it must leave the definition vague on the chance that it would not have time to engage in a rulemaking effort to add a toxic substance to the regulatory list. The IUG respectfully proposes that IDEM's rationale is erroneous for several reasons.

(1). Toxicity is defined by scientific evidence and ultimate administrative rulemaking.

(2) If at a later date a substance is deemed through scientific evidence and rulemaking to be "toxic" then its addition to the antidegradation implementation procedures will be appropriate and not before.

(3) It is unconstitutional to create a regulatory concept so vague as to leave the the water quality standard rules ill-defined by failing to implement the prescribed procedures for determining numeric "Tier I" and "Tier II" values to identify toxic characteristics of substances.

IUG proposes that the definition in the antidegradation proposal be narrowed to "substances that are harmful".

4. THE ECONOMIC ANALYSIS PROVIDED BY THE PROPOSED RULE NEEDS TO TAKE INTO ACCOUNT REGIONAL ECONOMIC IMPACTS THAT MAY OCCUR FROM ACTIVITIES SUBJECT TO ANTIDEGRADATION REVIEW.

In previous comments, the IUG has urged refinements to the rule to recognize the reasonable necessity of an economic analysis that takes into

account the regional nature of the economic impacts that may result from projects that trigger applicability of this rule . This is important to the electric utility industry as power plants located in one locality regularly may benefit those living in a more distant locality. IUG continutes to press the importance of addressing this issue in the rule as follows: with the addition of a new factor (O) be included in Section 5(g)(5) of the proposed rule:

> (O) Regional or statewide social or economic impacts of the activity associated with the proposed discharge.

5. 316(A) VARIANCES SHOULD NEVER BE SUBJECT TO ANTIDEGRADATION REVIEW

While IDEM acknowledged in its response to comments that, "316(a) variances should not be subject to antidegradation review," it still excludes such variances from waters designated as ONRWs. IDEM gives such variances, which are allowed by section 316(a) of the Clean Water Act, when a power company can "assure the protection and propagation of a balanced, indigenous community of shellfish, fish and wildlife in and on the body of water into which the thermal discharge is made." If 316(a) criteria were fully met, the applicable CWA protections would be achieved, which include protecting the existing uses. The statutory scheme and legislative history indicate that limitations developed under section 316 take precedence over other requirements of the Act and should therefore be exempt from antidegradation review.

In view of the foregoing points, IUG continues to urge that the exception for ONRWs be deleted from the general provision of Section 3(e) of the Proposed Rule that a determination approving alternative thermal effluent limits under Section 316(a) shall be deemed to be consistent with the rule's antidegradation standards.

6. 10% OF AVAILABLE LOADING CAPACITY

IUG welcomes the clarification provided by the agency that "the available loading capacity shall be established at the time of each request for a new or increased loading of a regulated pollutant."

7. THE DEFINITION OF "ENDANGERED AND THREATENED SPECIES"

IUG applauds the revision and clarification as to "endangered and threatened species." The rule should, however, make it clear in section 327 IAC 2-1.3-6(d)(3) that the state listed endangered and threatened species include only such lists that have been subject to public notice and comment.

8. THE DEFINITION OF "WASTEWATER"

The definition of "wastewater" contained in the Proposed Rule at Section 2(57) is a specialized definition associated with septage haulers formerly codified in statute at IC 13-11-2-256 (repealed by P.L. 159-2011, SEC. 49) that is inappropriate for general usage in the Proposed Rule. The IUG recommends that this definition be deleted from the Proposed Rule.

IUG recognizes the efforts to improve this rule and greatly appreciates the work committed to this important rulemaking. Indiana needs to have an antidegradation implementation program and we support that effort, provided the resulting program is technically correct, legally defensible, and places the state in a leadership role regarding concurrent consideration of economic growth and environmental stewardship.

IUG has submitted detailed written and oral comments it urges the agency to consider. As the formal rulemaking process continues, IUG will continue to work to provide meaningful comments to the agency's important efforts. IUG appreciates this additional opportunity to provide clarification and comment at this time.

Very truly yours,

Stan Pinegar
On behalf of the
Indiana Utility Group

INDIANA ENVIRONMENTAL
INSTITUTE, INC.

150 W. Market St., Suite 137
Indianapolis, IN 46204
317-313-9254 (phone)
317-687-5139 (fax)
e-mail: inenviro@iquest.net

Analysis of November 30, 2011 Proposed Antidegradation Standard and Implementation Regulation; December 7, 2011 Third Public Notice.

Bill Beranek
December 29, 2011

IDEM released a second notice draft on December 16, 2009 for public comment. In May 2011 it released revised draft requesting the Water Pollution Control Board to preliminarily adopt it. On September 14, 2011 the Board amended the May 6, 2011 draft and preliminarily adopted it.

The comments in this document are on the preliminary adoption version that IDEM released December 7, 2011, for public comment (third notice). Public comments are due December 30, 2011.

The comments are divided into three sections: summary, draft errors and policy changes. I put into "draft errors" what I consider oversights to implement the intended meaning. I put into "policy changes" those significant revisions intended by the Board and IDEM to change State policy.

A. Summary

The primary task before the Board was to fix the well-known deficiencies of the current Great Lakes Basin regulation for new or increased NPDES permit limits specifying how much information of what quality is necessary to provide for an antidegradation demonstration and what criteria should the commissioner use to predictably, fairly and consistently decide about whether to allow an increased loading. This serious deficiency was explicitly noted in the Barnes Report requested by Governor Mitch Daniels. The Governor pledged that would be fixed. Not to fix this means that the antidegradation

decision in Indiana is an unpredictable political decision, a situation unacceptable to environmental advocates and the regulated alike.

A second task before the board was to establish antidegradation implementation procedures for new or increased NPDES permit limits for parts of Indiana not in the Great Lakes Basin. An implementation regulation already exists for the Great Lakes Basin. When antidegradation is required for the parts outside the Basin, IDEM uses the relevant parts of the Great Lakes Basin regulation. Adapting the regulation to the rest of the state as a regulation should be straight forward. The antidegradation standard itself should be federal language. The implementation procedures are at state discretion subject to USEPA approval. That approval for Indiana basic components of a procedure had been given for the Great Lakes Basin.

A third task was to supply in regulation the procedures for the overall improvement requirement of the Indiana General Assembly for Outstanding State Resource Waters when a new or increased NPDES permit limit is requested. This requirement of the General Assembly for a regulation is a decade old.

The proposed regulation does not address the primary task to create a rule and guidelines that are clear and predictable about the nature and extent of an adequate antidegradation demonstration and about the criteria IDEM will use to accept, modify or reject a proposed new or increased NPDES permit limit. That decision remains political at complete discretion of the agency.

The proposed regulation similarly does not establish clear and prediction decision criteria for the overall improvement process in OSRWs. It simply repeats the Indiana statute.

It does establish an implementation regulation for the whole state.

Unfortunately, the proposed regulation does not address either the first or third of the tasks.

And, while not doing the key tasks, the regulation goes well beyond the new or increased NPDES permit limit to expand implementation in Indiana to include wetland filling, stream bank cutting and harbor dredging, trace constituents in an NPDES permitted discharge (both those that need an NPDES permit limit and those that do not need an NPDES permit limit), discharges from an indirect discharger into a POTW for a parameter other than has an NPDES permit limit, and storm water runoff parameters without an NPDES permit limit, point and nonpoint source.

The expansion of loadings have no de minimis thresholds and no written guidance about how what type of information and how much information of what quality is adequate for an

acceptable antidegradation demonstration. There is no direction for IDEM to make a consistent, predictable and fair about how to approve or disapprove a loading for nonNPDES permit loadings. Since these loadings can occur without a formal request (unlike the formal request of a new or increased NPDES permit limit), procedures are flawed because of missing directions about how and how frequently a request for permission for an increased loading is required. For wetland, stream bank cuts and harbor dredging, there needs to be clarity about how the information is different than that required for 401 certification.

It expands the scope of the implementation rule to situations other than the NPDES permit limit without establishing any conditions appropriate for each of those different situations. It changes definitions so that key terms governing the NPDES permit have a different meaning in the water quality standard rule.

B. Drafting Errors

1. **Applicability**

   327 IAC 2-1.3-1(a)

   The antidegradation standard applies to Section 3 and Subsections 4(a) and (b), not just Section 3.

2. **BADCT** 327 IAC 2-1.3-2(3)

   BADCT (Best Available Demonstrated Control Technology) Is defined in this proposed regulation as a "wastewater treatment." This regulation defines wastewater at 327 IAC 2-1.3-57) to be human excreta; grease, fats, septage, etc. It is not industrial waste water, animal manure waste water or any waste other than that in human sewage.

   Therefore the BADCT definition restricts it only for domestic waste treatment, which is inconsistent with the use it seems to be put to in the implementation section of the rule.

3. **Discharger**

   There is no definition of "discharger" in this rule. The definition of "discharge" is being changed in this rule from the existing definition to be different than the Article 5 definition. Is the definition of "discharger" used in antidegradation intended to be different as well? That is significant as to whether for antidegradation a discharger can be an entity other than a point source. The definition of discharge in Article 5 is paired tightly with definition of discharger. (Otherwise the logic for the action described in this rule's definition is "a discharge is a discharge.")

4. *Short-term, temporary, new, or increased discharges of mercury and nonBCC*

(327 IAC 2-1.3-4(a) and (b))

a) **the exemption from antidegradation demonstration requirement in OSRW in Section 4(a) is just from Section 5; for an Indiana regulation it also must be from Section 7.**

As written, the Indiana-only antidegradation requirement of Section 7 overall improvement project (or $500,000) applies to any such temporary discharge exempt from federal antidegradation.

That is inconsistent with the federal philosophy of allowing such projects to proceed in federal jurisdictional waters without the full-scale burden of an extensive demonstration and lengthy legal conflicts.

It also requires IDEM to develop the concept of a "temporary" water quality improvement project.

b) **Implication for change in definition of discharge**

The Section 3 component of the antidegradation standard refers to "loading." The temporary exception to the standard refers to "discharge." In existing rule, federal tradition and still after this rule would be adopted in Article 5 "discharge" is a point source discharge. This rule changes the definition of "discharge." Without a corresponding definition of "discharger" in this rule, the term "discharge" used for the temporary release is ambiguous as to whether it is just for point source (current antidegradation rule) or for point source and non-point source.

c) What is meant in 4(a) and 4(b) is not "***Short-term, temporary, new, or increased discharges" but rather what is meant is "new or increased discharges that are both short-term <u>and</u> temporary."***

The language as written eliminates the requirement for short-term and temporary.

A list of modifiers connected by "or" means that each modifier can act independently to give the sentence meaning.

Thus the IDEM proposed rule means each of four different things:

An exemption from antidegradation review is allowed for
all short-term discharges of mercury and nonBCCs.

An exemption from antidegradation review is allowed for all temporary discharges of mercury and nonBCCs.

An exemption from antidegradation review is allowed for all new discharges of mercury and nonBCCs.

An exemption from antidegradation review is allowed for all increased discharges of mercury and nonBCCs.

Obviously, none of these statements are meant to be true.

Allowing an exemption from antidegradation for either a new or increased discharge of mercury and nonBCCs makes no sense unless the discharge is <u>both</u> temporary <u>and</u> short-term. This is not an "or" situation. "New or increased" is a phrase together. It must be conditioned by the phrase "both temporary and short-term" in order to have the meaning intended.

Therefore I suggest a correction to be for both 4(a) and 4(b):

..."an exemption from the antidegradation demonstration requirements included in section 5 and section 7 of this rule shall be allowed for new or increased discharges mercury and nonBCCs that are both temporary and short-term."

5. **Significant lowering of water quality definition** 327 IAC 2-1.3-2(50) (51)

This is a definition with several problems that need correction. Problems include:

a) Definition is circular

De minimis is not defined in the regulation. If the "de minimis lowering of water quality" of 327 IAC 2-1.3-2(51)(A) is intended as the de minimis in Section 4 despite 327 IAC 2-1.3-2(51)(B) stating: "and none or provisions of the provisions of section 4 of this rules applies" then it is a circular definition. "Significant lowering of water quality" is defined in Section 2 as "de minimis lowering of water quality" which in turn is defined in Section 4 as significant lowering of water quality for NPDES permit limit situations; the definitions of both de minimis and significant lowering should be defined in independent terms

Clarification of significant lowering of water quality and de minimis is critical to be in compliance with State statute (IC 13-18-3-2(q) and (r) with reference to 13 IC 13-18-3-2(l)(1).

Establishing an antidegradation policy with no de minimis, which is what this regulation does for many activities situations addressed is illegal by state law.

b) Verb is incorrect for de minimis:

*the loading per se "is not greater than de minimis lowering;" the concept rather is that the loading "does not **cause** a de minimis lowering" or "cause" a significant lowering. The load is water is being added to the water; the lowering is happening in the water. See use in antidegradation standard in Section 3.*

I am not suggesting here what should be the meaning of significant lowering and of de minimis, just that for the purpose of the rule, the terms should be unambiguously defined.

6. Appeal the commissioner approval of an antidegradation demonstration
327 IAC 2-1.3-6(g)

By Indiana law, any determination of an agency can be appealed by all parties with standing to appeal. This is especially clear for "final determinations."

The proposed regulation adds a new opportunity for an appeal at the point in the middle of an NPDES permit development process or 401 Certification process or any other process addressed by the proposed antidegradation implementation rule where a controlling document will be issued by the agency.

"when the commissioner makes a determination on an antidegradation demonstration, the commissioner shall public notice the antidegradation demonstration according to 327 IAC 5-2-11.2"

Arguably, because that is called a "determination" by the Commissioner which has been public noticed, any aggrieved party may appeal the Commissioner's determination.

Following that process, there then is a "final determination." It is not clear whether this "final determination" comes after comments froim the public notice or after the appeals have been exhausted or whether this is language describing the earlier "determination" as itself being a "final determination.

Be that as it may, any "final determination" itself by a government agency is subject to appeal.

The rule states that, if it is an NPPDES permit being considered, that the "final determination (presumably again after appeal process is exhausted) will be incorporated into the NPDES draft permit and fact sheet. So for an NPDES permit the appeals happen prior to the normal process for the agency to seek comment on the draft permit.

This problem must be eliminated. The challenge comes from informal use of language. What is happening should not be that a party is doing an "antidegradation demonstration" to IDEM any more than the party is doing an NPDES permit or a wetland certification. In all of these situation the party is submitting information for IDEM to do the demonstration and the permit and the certification. For antidegradation IDEM is doing the demonstration as delegated from USEPA, ideally with engagement of EPA prior to its final permit decision. An incorrect antidegradation demonstration is remedied by a citizen suit against USEPA under the Clean Water Act.

There is no good public policy purpose to adding more points of appeal inside the state process than necessary.

For the NPDES permit, the process should be for the party to submit information needed for permit conditions and for antidegradation demonstration. The agency, with appropriate discussion with public and party makes a TENTATIVE DECISION (not a determination and certainly not a final determination) about the draft permit and what it considers a defensible antidegradation demonstration for the draft permit decision. The TENTATIVE DECISION is released as a draft permit and fact sheet for formal public comment. It is only after it has received and considered comments from the public and the discharger that the agency makes its final determination on both the permit and the antidegradation demonstration. That is the final determination that can be appealed through the state process. That should be the only determination.

A similar process should be crafted for the 401 certification inside the 404 permit. There is no reason for extra appeals.

Where there is no control document and this antidegradation implementation applies, there does need to be mechanism for appeal but again that must be crafted for each specific regulatory situation so that system is as efficient as possible.

Not to fix this in the regulation will create inconsistencies and great inefficiencies in environmental protection in Indiana.

7. **Applicability and Demonstration of Implementation Inconsistent with Determination Section With Respect to person or loading versus discharger**

discharge def in 2-1.3-2 is for any regulated pollutant
discharge def in 5-1.5-10 is for any pollutant
discharger in 5-1.5-11 is of pollutant from point source

The new definition of "discharge" for this rule only and the absence of a definition of discharger means that the Board must be extremely careful to be consistent in the application across the rule so that when the Courts determine what the Board meant this to apply to, that is what is meant at each point in the rule.

The implementation applicability provision (section 1) and the first two implementation sections (4 and 5) of the implementation procedures have been ***changed*** *by IDEM to apply to not only to a new or increased NPDES permit limit but also to wetland filling, stream bank cutting and harbor dredging, trace constituents in an NPDES permitted discharge (both those that need an NPDES permit limit and those that do not need an NPDES permit limit), discharges from an indirect discharger into a POTW for a parameter other than has an NPDES permit limit, and storm water runoff parameters without an NPDES permit limit, point and nonpoint source. (Section 5 (a), where basic information is provided for a demonstration, does use the newly ambiguous term "discharge.")*

Section 6 (Commissioner determination) contains references to "discharge" and even to "discharger." If this proposed rule is adopted, The only definition in Indiana water regulations of "discharger" will be of an entity who has a point source.

Language must be consistent across all parts of implementation rule about who the implantation process are designed to address.

Even where a section explicitly applies to situations other than the NPDES permit limit increase, the language of the section makes sense only in context of an NPDES permit limit process. This leaves open serious gaps in basic procedures and expectations. That in turn creates opportunity for political chicanery with IDEM discretionary decisions changing from staff to staff and administration to administration.

C. Policy Changes in Proposed Regulation Compared to Existing Regulation

1. Expansion of implementation regulation from new or increased NPDES permit limit using language and concepts that only makes sense in context of an NPDES permit limit system

327 IAC 2-1.3-1(b)

a. *Applicability of the antidegradation standard (327 IAC 2-1.3-1(a)*
   - *is restricted to surface waters to be consistent with federal law,*
   - *is expanded to beyond federal jurisdictional waters to include all waters of the state and,*
   - *by its silence, applies to all pollutants.*

   (Section 3, the antidegradation standard partly copies federal language including the concept of "significant lowering of water quality" being allowed but then restricts the applicability of the standard itself to "regulated pollutants" instead of all pollutants.)

b. **Applicability for implementation (327 IAC 2-1.3-1(b)) says this particular implementation procedure in this regulation applies to all "regulated pollutants" (an Indiana set of parameters) that have a "proposed new or increased loading"**

   This proposed implementation regulation is a large expansion of situations covered compared to the current State government discretionary authority of applicability of the antidegradation implementation. The implementation regulation also creates many new situations requiring an antidegradation demonstration with no de minimis and no language tailoring the timing of the new requirement or the demonstration to those new situations.

   i. ***Expansion of activities covered by antidegradation implementation rule***

   The implementation applies now to any proposed new or increased loading, regardless of type. The loading is not just from a new or increased permit limit, although that is included. It is any loading. The scope is broadened but the language is not tailored to make sense for the new activities that IDEM is to use this implementation language to address.

The current implementation regulation for Indiana Great Lakes Basin (327 IAC 5-2-11.3 and 11.7) addresses almost exclusively situations of a new or increased NPDES permit limit. It does allow for requests for significant lowering of water quality for other "permit or reviewable document" but no details are supplied for procedures for those.

This proposed rule expands situations covered by this particular implementation rule to actions other than addressed in permits or reviewable documents. The advantage to the current rule restricting this implementation to an action under a "permit or reviewable document" is

1) there is a well-understood time when the consideration of the loading is to happen because there is already the requirements for a government action under the permit or the reviewable document regulation (hence there already is a point of request for IDEM action before proceeding) and

2) the parameters whose loading is considered are those whose increase is required to have a limit in the permit or reviewable document. The current rule makes it clear when an antidegradation implementation is to be considered and what parameters are the ones to focus on.

(The almost exclusive focus of the existing implementation rule is for NPDES permit situations. It is vague about anything other than that. It does allow for flexibility without details for addressing increase loading of BCC by a "deliberate activity" with a "control document" in the Great Lakes Basin.)

The expansion of scope of the proposed rule eliminates that establishment of a time for when to implement an antidegradation review and what to review for all situations that do not require an action under the NPDES permit system such as trace constituents in point source discharge, indirect discharge increases or nonpoint source storm water. Expansion of implementation to include the 401 Certification (wetlands, steam bank cuts and harbor dredging) is situation where a request is already in the system to trigger the antidegradation review.

In addition, the expansion of scope of the implementation rule into actions other than those that trigger NPDES permit limit adjustment occurs without proper regulatory direction about how to comply or how the government is to decide what is appropriate behavior, the major programmatic deficiency that the regulation does not address even for NPDES permit situations.

ii. No de minimis for situations other than new or increased NPDES permit limit for nonBCC

The current Indiana antidegradation implementation regulations (327 IAC 5-2-11.3 and 11.7) are designed explicitly for activities with greater than significant lowering of water quality.

The proposed implementation regulation applicability section (327 IAC 2-1.3-1(b)) explicitly omits the loading of concern being that greater than significant lowering of water quality. The proposed rule's antidegradation standard in section 3 states that there can be allowed more than a significant lowering of water quality under specific conditions. However, the implementation applicability statement does not incorporate that concept. It implies that that the threshold of that significant lowering should be zero for an antidegradation demonstration unless otherwise explicitly stated differently in the regulation. The implementation regulation does establish a significant lowering of water quality measure for a proposed NPDES permit limit of a nonBCC but not for parameters in the discharge that do not need a permit limit nor for any of the other non NPDES permit situations now covered.

In practice, this means that now the loading for anything other than an NPDES permit limit increase of a nonBCC has no de minimis. Any loading no matter how infinitesimal it is, or its impact is, is subject to the conditions of this implementation regulation. The applicability sentence does end with a phrase stating that included in this new broad scope are "change in process or operation that will result in a significant lowering of water quality" but that phrase is unnecessary and adds no new information. Of course any loading from a specific action causing significant lowering is covered if every activity with a loading of any amount at all is covered.

State law adopted by the 2009 General Assembly requires a de minimis for all situations for which antidegradation is implemented. See IC 13-18-3-2(q) and (r) with reference to IC 13-18-3-2(l)(1). The law does not specify what de minimis should be. There are many ways to do it. But state law requires that there be a de minimis for all pollutants and situations for which antidegradation is applied.

Note in this statute that the General Assembly is assuming that antidegradation implantation procedures in Indiana regulation are for NPDES permit situations.

2. **Elimination from this implementation procedure waters of the state that are not federal jurisdictional by restricting to activities "subject to the Clean Water Act"** 327 IAC 2-1.3-1(b)

The current Indiana implementation regulation for the Great Lakes Basin includes all surface waters of the State in the Basin. The proposed standard applies to all waters of the State throughout the State. The proposed implementation language applies to all waters through the state but excludes waters that are not under federal jurisdiction.

By restricting the applicability of the implementation only to "activity subject to the Clean Water Act," any activity not impacting a federal jurisdictional water is excluded from the State's antidegradation implementation procedures.

The regulation in 2-1.3-1(a) states that the antidegradation standard applies to loadings on these other waters, but the implementation procedures IDEM is to use are not to be the ones in this implementation regulation.

For example, this implementation excludes isolated wetlands and the moving target of any waters the Court determine to be outside the jurisdiction of the Clean Water Act.

3. **Adjustment of BCC Policy**

a) **Adjustments of BCC loading requirements to Great Lakes Basin**

The federal government requires all new BCC loadings to Great Lakes Basin to be given special antidegradation consideration, namely that it should be reviewed whether the purpose for the addition of a BCC could be achieved by a nonBCC. The existing Indiana regulation chose not to have that special antidegradation review but instead contains an absolute prohibition of any increase in loading of a BCC.

The revised rule eliminates the prohibition of new BCC discharges in the Great Lakes Basin except for those BCCs loaded into OSRW in the Great Lakes Basin at a level to cause a "significant lowering of water quality." The revised rule then in section 4(c) excludes BCC from the calculation of an NPDES permit limit the measure of significant lowering of water quality. That means there the "significant lowering" condition is moot; there is no de minimis procedure in regulation for BCC.

Finally, the demonstration language in the revised regulation itself has no special provisions for BCC evaluation, such as can a discharger achieve the same objective by using a nonBCC material.

Therefore the revised rule

i) allows BCC loading into Great Lakes Basin other than OSRW;
ii) effectively prohibits all loading of BCC other than mercury into OSRW in the Great Lakes Basin;
iii) requires all new loadings of BCC to any federal jurisdictional surface waters in the state to undergo antidegradation review without de minimis; and
iv) has no antidegradation procedure specific for replacing the load of a proposed increase of a BCC with a nonBCC.

b) Expansion of regulation of BCC to outside the Great Lake Basin

The proposed regulation has no antidegradation de minimis loading for BCC to apply to the entire state, not just the Great Lakes Basin.

The existing antidegradation regulation for Great Lakes Basin has a special consideration for BCCs in permitted discharges (327 IAC 5-2-11.3(b)(1) – " proposed from any existing or new facility, either point source or nonpoint source, for which a new permit, permit modification, or other control document would be required" - this includes NPDES permitted activities plus "other deliberate activities that, based on the information available, could reasonably be expected to result in an increased loading of any BCC to any waters of the Great Lakes."

The regulatory control of BCC was established and justified by USEPA because it claimed that the Great Lakes Basin was vulnerable to harm from BCCs in a way that free-flowing water systems such as the Mississippi Basin were not. It made the scientific argument that the characteristics unique to the specific aquatic systems of the Great Lakes and the hydrologic flow of the Great Lakes (bath tub with long retention times). The mathematical algorithm for BCC was for the Great Lakes bioaccumulation characteristics of the aquatic system assuming hydrologics of Great Lakes.

The proposed regulation makes the scientific assumption that for Indiana, the rivers, streams and lakes have the same retention as the Great Lakes and the same or equivalent bioaccumulation characteristics of the Great Lakes, counter to the USEPA technical argument.

It may well be that certain waters need special protection from new discharge of the Great Lakes BCCs because the Mississippi Basin aquatic

fish chains are similar with respect to bioaccumulation and fish consumption patterns or it may not be the case.

c) *BCC Antidegradation Demonstration*

There is no significant lowering of water quality exemption for loading of BCC in Section 4 of the proposed rule.

That means that any new or increased loading of a BCC requires an antidegradation demonstration.

There is no requirement in the demonstration that explicitly requires a discharger to explore option of performing the function with a nonBCC. That was the core expectation by the federal government when the original BCC concept was developed.

The only mention is the fact that an increase loading of a substitute constituent may be allowed a less comprehensive antidegradation review if the substitute has a lower biaccumulative capacity in a Great Lakes Basin ecosystem. That is a completely different concept.

d) **Mercury policy**

1) **Elimination of mercury as BCC for two antidegradation purposes in OSRW in Great Lakes Basin**

The existing Indiana antidegradation regulation prohibits absolutely any new or increased load of any BCC (bioaccumulative chemical of concern) into waters of Great Lakes Basin. This is stricter than federal law. Federal guidance for BCCs into Great Lakes Basins is not to prohibit new or increased discharge but to require justification of why a BCC could not be substituted for by a nonBCC.

The immediate problem with an absolute prohibition is that mercury is listed as a BCC but it is present in source water. Mercury is present is rainfall everywhere in the world at approximately 1.5 ng/L due to natural and human causes. Trace levels of mercury is present in all ground water from natural minerals. Therefore all Indiana water sources contain mercury at some concentration. To declare an absolute prohibition of any new or increased load means an absolute prohibition of any new or increased discharge of water. A current impact of this is a prohibition of a new sewage treatment plant to replace septic systems to protect lakes in northeast Indiana. Thus attempts to reduce nutrient load to small lakes is inhibited by this absolute prohibition of increasing the load of mercury.

The proposed regulation removes the BCC discharge prohibition for new mercury loading in OSRW of Great Lakes Basin while keeping the

prohibition for other BCCs. It eliminates the prohibition of discharge for mercury in other waters of the Great Lakes Basin by eliminating altogether the prohibition of new BCC discharges to those waters. However, it does not complete the solution by specifying that an antidegradation review for a BCC into the Great Lakes should include consideration of substituting a nonBCC for any BCC increase in effluent other than that BCC from source water.

Note that any antidegradation policy for mercury does not negate that already aggressive provisions in the NPDES permit limit system to address mercury whatever the source to protect surface water quality to the water quality standard appropriate for the water body. That policy is so aggressive that in order to comply most POTWs need a variance with its own restrictive requirements to find and address mercury.

2) Impact of mercury as BCC throughout state

i) is explicitly excluded from consideration as a BCC from two parts of the BCC antidegradation policy:

- *temporary mercury discharges into OSRW Great Lakes Basin are allowed without antidegradation review (327 IAC 2-1.3-4(a))*
  (there is no exemption for temporary mercury loadings other than point source discharges such as nonpoint source storm water runoff)
- *permanent increases of mercury loading into OSRW Great Lakes Basin is allowed with antidegradation review*

ii) mercury remains as a BCC for purposes of other regulatory provisions:

- *voids the exemption from antidegradation review for expanded POTW due to increasing sewer area et al if there is "no increased loading of BCCs from nondomestic wastes" because there is trace concentrations of the BCC mercury is in all surface and ground water (327 IAC 2-1.3-4(c)(D)(iv)) .*
- *voids the exemption from antidegradation review for noncontact cooling water if there is "increase the loading of BCC" because there is trace concentration of the BCC mercury in all surface and ground water (327 IAC 2-1.3-5(b)(3)(B)).*
- *eliminates any significant lowering threshold for any new or increased NPDES permitted discharger to any water in the state when there is proposed an increase in water discharge; therefore all dischargers increasing water will be required to perform mercury antidegradation review even if not significantly lowering water quality for other loading of permitted parameters.*

(this would also apply to nonNPDES permit limit loadings such as indirect discharger and storm water flows as well but there is no procedure to establish de minimis for nonNPDES permit limit loadings in the first place)

4. No de minimis for significant lowering of water quality for increases other than a new or increased nonBCC NPDES permit limit

327 IAC 2-1.3-2(51) and 327 IAC 2-1.3-4(c)

Because available loading capacity is defined in the proposed regulation in a manner of the NPDES permit mathematical algorithm with concepts such as total loading capacity of a flowing water with a parameter with a numeric water quality standard at its design flow including effluent flow at its maximum permitted flow, there is no means to calculate a de minimis for increases that are not nonBCC NPDES permit limit increases.

State law at IC 13-18-3-2(q) and (r) with reference to (l)(1) requires that there be a procedure to assign a de minimis for antidegradation.

Wetland filling, stream bank cutting, harbor dredging, increase in existing effluent concentration from an indirect discharger, increase in existing effluent concentration of an NPDES discharger of parameters too low in concentration to need a permit limit, storm water increase outside the parameters with an NPDES effluent limit all will now be illegal without first an antidegradation review no matter how small the increase in loading to a federal jurisdictional water. (For nonjurisdictional waters of the state it is possible for IDEM to develop its own significant lowering threshold because those waters are not regulated by the implementation provisions of this proposed regulation.)

The threshold is related to a "request." This is consistent with a request for new or increased NPDES permit limit but leaves ambiguous the situations of increased in loading of applicability 327 IAC 2-1.3-1(b) for which there is no "request" such as increase in loading of trace existing effluent concentrations that occurs during the course of business or storm water occurrence.

Moreover, there are substances with NPDES permit limits without water quality criteria and thus no way to establish an available loading capacity for the Section 4(c) significant lowering of water quality determination. State law requires a de minimis procedure.

5. Ambiguity for application of availability loading capacity

327 IAC 2-1.3-4(c)(1)

Existing 11.3 is more complete and unambiguous in its explanation.

a) Context of use of available loading capacity in this regulation

The concept of "available loading capacity" is critical to this proposed regulation to determine whether a "new or increased loading" is sufficient to cause a "significant lowering of water quality" and therefore would require an adequate justification by an "antidegradation demonstration" to allow. The available loading capacity is used to set the de minimis loading.

As defined and as used in this proposed regulation, the available loading capacity term is restricted to a parameter that both

1) is regulated by a specific water quality standard and stream design flow enforceable as a point source under an NPDES permit limit AND

2) is a non-BCC.

Situations of new or increased loading other than those with new or increased NPDES permit limit do not have an " available loading capacity" as defined by the regulation and therefore have no de minimis increase. Any increase of any magnitude other than the permit limit automatically requires an antidegradation demonstration.

The proposed regulation changes the use of the available loading capacity compared to the existing regulation and adds the concept of cumulative loading.

b) Ambiguous formula in proposed regulation for NPDES limit

327 IAC 2-1.3-4(c)(1)

A formula for a theoretical antidegradation "available loading capacity" for consideration of a new or increased NPDES permit limit is defined in the proposed regulation (327 IAC 2-1.3-2(2)). It is used by the regulation at 327 IAC 2-1.3-4(c)(1) to calculate whether a threshold for a "significant lowering of water quality" is being proposed to be exceeded by the new or increased NPDES permit limit and thus requiring an antidegradation review to justify the new permit condition.

Unfortunately, the language describing the components to be used for the available loading capacity when it is used in the significant lowering determination is ambiguous. If this is not clarified, legal disputes could

arise as either the regulated or environmental advocates challenge an IDEM interpretation or that IDEM staff interpretation varies over time. The solution is to write a complete unambiguous mathematical formula as is done elsewhere in the current regulation.

EXPLANATION OF ALC AMBIGUITY:

Available Loading Capacity (ALC) means the Total Loading Capacity (TLC) less the Used Loading Capacity (ULC).

Depending on the choice of TLC and of ULC, there can be three different ALC formulations described by the same words in Section 4(c). All three formulations can be described in words as "at the time of request" but they are completely different depending on exactly which TLC and which ULC is meant.

I provide the list below not to endorse any particular ALC for any particular application but just to illustrate that if the proposed language is allowed to stand without stating the ALC to be used in an unambiguous mathematical formula, there may well be serious policy disagreement about which is meant in years ahead.

A. Available Loading Capacity in the water body prior to any NPDES Permit Limit

When the receiving water has no NPDES discharge,

the TLC_0 = SDF[WQS], where SDF = stream design flow
and WQS = water quality standard

the ULC_0 = SDF[background concentration].

$ALC_0 = TLC_0 - ULC_0$

This is an available loading capacity that many think of when the term is used.

B. Available Loading Capacity as a proposed first NPDES permit limit for a substance is calculated

$ALC_p = TLC_p - ULC_0$

where TLC_p = (SDF + PEF)[WQS]
when PEF = Proposed Effluent Flow
and ULC_0 = SDF[background concentration]

This could be the ALC used in Section 4 of the draft rule when measuring 10% for de minimis.

("available loading capacity determined at the time of the specific proposed new or increased loading" 327 IAC 2-1.3-4(c)(1)(A)(i))

C. Available Loading Capacity after the Proposed First NPDES Permit for a Substance is Granted

$ALC_p = TLC_p - ULC_p$

where ULC_p = Proposed Effluent Load + Background Load

This could be the ALC used in Section 4 of the draft rule when measuring the benchmark as 90% of the ALC for antidegradation significant lowering determination for subsequent permit modifications.

("available loading capacity established at the time of the request for the initial increase in the loading" 327 IAC 2-1.3-4(c)(1)(A)(ii))

D. Available Loading Capacity for NPDES Permit Modification

If the standard is for chronic aquatic protection, as the wasteload allocation is converted to a water-quality-based effluent limit, the permitted discharger can only use up to ¼ of the 10-year, 7-day ALC_0 for dilution. ¾ of the low-flow ALC_0 can never be used for dilution (and, of course, no flow above the 10-year low-flow can be considered for dilution) when determining compliance with the WQS. If the discharger were at maximum effluent flow and maximum permit concentration (for practical reasons, this is never done) and using the maximum amount of dilution water available from the stream at low-flow, the three-times as much of the low-flow stream that was used as "available capacity" for dilution is not allowed to be used up. Most days, the stream flow is much larger and none of that "available capacity" is available to the discharger to use to increase load to stream.

[Note that this is different mathematically than the concept of TMDL (Total Maximum Daily Load) as developed practically in recent years by USEPA. TMDL addresses capacity as concentration in stream at any flow, not at stream design flow that the available loading capacity and NPDES permit use. Thus for the TMDL the compliance point is whatever concentration is in the stream when a measurement is taken – that should always be at the water quality standard or less. The NPDES permit limit is a much tighter compliance value as established by use of stream design flow in the water quality criteria and by further constraints in the water quality-based effluent limit applicability of the standard.]

6. Changes definitions in Article 2 (water quality standard) to be inconsistent with Article 5 (NPDES permit) for the critical terms "discharge" and "regulated pollutant."

Antidegradation implementation policy is a bridge between the antidegradation standard, a part of the water quality standard part of regulation and the implementation procedures which appropriately belongs to the part of regulation controlling particular activities. In the existing regulation, the antidegradation implementation procedures controlling NPDES permits are in the NPDES regulation itself.

The proposed regulation puts both the standard and the implementation in Article 2. Article 5 governing NPDES permits stands outside the antidegradation regulation. Also outside Article 2 implementation are the existing and the missing regulatory controls for the other activities governed by the newly expanded implementation rule in Article 2.

It is essential that the terms between the Article 2 implementation and the Article 5 are consistent, ideally identical. The proposed rule creates a two inconsistencies in core terms, namely what substances are addressed and what a discharge means.

a) Regulated Pollutant Definition 327 IAC 2-1.3-2(44)

Article 5 governing NPDES permits addresses "pollutants," the core term of the federal Clean Water Act. The proposed regulation changes what antidegradation implementation addresses for NPDES permit limits (and all other nonNPDES permit limit loading increase situations) from "pollutant" to "regulated pollutant," with a different definition.

This is a major change with many consequences that are difficult to assign.

The proposed regulation does not use the new term "regulated pollutant" directly in the antidegradation standard applicability at 327 IAC 1-1.3-1(a) nor in the antidegradation standard in 327 IAC 1-1.3-3(b),(d) or (c)(1)or(2) nor in the applicability of the standard to temporary discharges (327 IAC 1-1.3-4(a)and (b)). It is used directly in the Tier 1 antidegradation standard, changing the applicability from all pollutants to just those that are "regulated pollutants." That is a basic alteration of the fundamental flexibility to consider impaired waters by federal regulation.

The term "regulated pollutant" is used indirectly in the antidegradation standard when "significant lowering of water quality" and "discharge" is used. Instead of the federal focus on all pollutants, these are redefined as restricted to "regulated pollutants."

Regulated pollutant is also directly used when describing the overall improvement requirements in Indiana OSRW.

However, even though "regulated pollutant" is not used directly in the Tier 2 antidegradation standard, all of the implementation of that standard are restricted to "regulated pollutants" (327 IAC 2-1.3-1(b)). Then regulated pollutant is used almost exclusively throughout the implementation parts of the regulation (except for parts such as noncontact cooling water and water treatment additive in 327 IAC 2-1.3-5(b)(3) and (4)).

It is strange that a term integral to the Indiana antidegradation implementation procedures is not used once in the antidegradation standard describing what the implementation is to do.

This change makes the universe of situations covered by implementation smaller than the federal antidegradation standard and larger than the NPDES permit limit in unpredictable ways. The federal standard applies to all conditions of degradation without exception. The existing regulation describes a specific implementation procedure for a subset of situations the standard applies to, namely the new or increased NPDES permit limit. In that regulation, whatever substance or condition that can have a permit limit what is addressed in the implementation. The proposed regulation expands the substances an NPDES permitted discharger must address. For instance the Article 5 NPDES permit restricts the numeric permit limits to particular substances that cause the narrative standards to be exceeded; this propose implantation regulation imposes the narrative criteria themselves as the "parameters" being discharged with an available loading capacity. The purpose of the narrative standard is to identify problems in the receiving water to address, not to assign numeric values directly for an effluent.

Then the question is how does IDEM intend the term "regulated pollutant" to be different than the Article 5 "pollutant" or the Clean Water Act "pollutant?"

Implications of "Regulated Pollutant" definition as written:

i) ***The definition of "regulated pollutant" is not clear.***

The rule defines it as a "parameter of a pollutant," a phrase itself that needs interpretation. Does parameter here mean "component" of a pollutant? Or aspect of a pollutant? Or does it mean that it is not a pollutant in some significant way? Why should a regulated pollutant not simply be a pollutant?

What is the relationship between the "criteria" portion and the "may be in a permit limit" portion of the definition? I am assuming if a "parameter of a pollutant" falls under either category it is a regulated pollutant. Therefore, the subcategory of "excluded" despite a having water quality criteria does not mean excluded from being a regulated pollutant if the parameter could be in a NPDES permit.

ii) ***What does" adopted in or developed pursuant to" 327 IAC 2-1 or 327 IAC 2-1.5 mean?***

Presumably "adopted in" means promulgated by the Board in regulation at the effective date of the new rule or at any time in the future. Then "developed pursuant to" means IDEM uses the calculation procedures in the existing regulation to establish criteria for additional substances based on new toxicity information but does not request the There is no limit to the substances that are "regulated pollutants" using this procedure.

It is not clear whether such a provision is written to include trace compounds with endocrine hormone disrupter characteristic or to exclude them. I could make arguments either way. Similarly with Tier II values: is use of term "criteria" to exclude them or is it intended we revert to former regulatory procedures?

Note that this provision is a moot one because the initial trigger for proposed Tier 2 water degradation is that there not only is an applicable water quality criteria but also a water quality standard that is being achieved in the water for the parameter proposed to be increased.

(The process in the Clean Water Act is first the state determines a water body impaired for a particular reason. Then it establishes water quality criteria for substances specific to that water body and that impairment. Then it establishes the desired designated uses and the appropriate water quality standard. Achievement of that water quality standard for that parameter is what determines whther the water is high quality for that parameter and, in turn, whether an antidegradation review is needed to

allow a new or increased loading of that parameter if the loading would cause significant lowering of water quality. Any crafting of a efficient and effective antidegradation implementation procedure must remain inside that intellectual construct.)

iii) Narrative criteria as a regulated pollutant

The narrative criteria "free-froms" are water conditions caused by pollutants. They are not pollutants themselves. The conditions described do meet the definition of any of the listed pollutants. The narrative criteria are the ways that all of the listed pollutants could cause impairment to the water. To be practical, a regulated pollutant should be the entities that cause pollution and can be named for control; it should not be the water condition to be alleviated.

The regulated pollutant definition itself excludes dissolved oxygen and pH as being conditions of pollution to be addressed, not directly as "regulated pollutants." Those are types of characteristics captured in the narrative criteria.

> The narrative standard in 327 IAC 2-1-6 and 327 IAC 2-1.5-8 says that
>
> "All waters at all times and all places...shall be free from substances, materials, floating debris, oil or scum attributable to municipal, industrial, agricultural and other land use practices, or other discharges:
>
> that will settle to form putrescent or otherwise objectionable deposits that are in amounts sufficient to be unsightly
> that produce color, visible oil sheen, odor or other conditions in such a degree to create a nuisance
> that are in amounts to kill or severly injure aquatic life or humans unless IDNR approved applications
> that are in concentrations that will cause or contribute to growth of algae or aquatic plants to extent to cause nuisance

The narrative criteria is a condition in the water to be avoided, not a pollutant to be loaded.

A "narrative criteria" does not have an available loading capacity to use to determine a de minimis.

As a tool, the narrative criteria must be obeyed when issuing NPDES permits as it must be obeyed when addressing all point and nonpoint source contributions to water quality. It is appropriate to consider when evaluating the relative value antidegradation technical options for loading reductions but it itself makes no sense at all as being a regulated pollutant.

iv) Excluded criteria (biological, pH and dissolved oxygen)

If I understand the regulation, any specific biological material, pH and dissolved oxygen are not a regulated pollutant by virtue of the fact that a water quality criteria exists for them.

But they in fact are all regulated pollutants because a permit may include them. They are definitely included if a permit does include them.

Therefore, it is not clear to be what is intended by the language.

The challenge of pH is not an antidegradation one but a permit one or an uncontrolled release one, not a loading one. High pH (especially high alkalinity) can be good or bad depending on circumstance as can low pH (especially buffered acidity). That is addressed in other parts of the law; antidegradation "lowering" is not well-suited to that for technical reasons. Inadequate dissolved oxygen is a quality impairment that is often related to multiple components of the loading. It cannot be addressed in the same terms as a toxic chemical substance with its loading capacity. But proposed language does not address the special issue of pH and dissolved oxygen in antidegradation correctly. It certainly does not address potential human pathogens in human sewage correctly.

v) "May be limited in an NPDES permit"

what pollutant or substance may not be limited in an NPDES permit? Is this meaning to say the universe of chemicals/biological/physical that could be limited somewhere somehow? That is infinite.

Is this meaning to say that have been limited in an NPDES permit by the means listed somewhere, somehow? That is finite but large and steadily expanding and goes well beyond numeric criteria that "have been adopted in or developed pursuant to" Indiana water quality criteria rules.

Is this referring to a particular NPDES permit situation where IDEM is using one of the listed techniques to establish a particular permit limit for that particular situation? If that is intended, that needs to be stated directly.

There is no reason to add the new term "regulated pollutant" for antidegradation implementation, especially a term inconsistent with terms of the federal and State antidegradation standard and the federal and State NPDES permit regulation terms.

b) "Discharge" definition 327 IAC 2-1.3-2(17)

The proposed regulation changes the definition of "discharge" to "discharge of a regulated pollutant" (327 IAC 2-1.3-2(17) from "discharge of a pollutant" which means "addition of any pollutant.....to any waters of the state from a point source in Indiana" (327 IAC 5-1.5-10 and 11).

That means that "discharge" in Article 2 not only is for a different set of substances than Article 5 but could be considered to apply to any release to water, not just point sources as in Article 5. One key term with two different meanings introduces confusing language regarding when the implementation is restricted to point source and when it is not. Especially with the long history in water law with interpretations based on the original meaning.

It is possible to craft careful language to provide whatever meaning is desired without using a word defined two different ways in two interrelated regulations.

[Fortunately, the proposed regulation does not use the problematic terms "discharge" and "regulated pollutant" in any of its rule language for delegated authority of the federal antidegradation standard. The ambiguous and conflicting terms are only used through the state implementation portions. For instance Section 6 (commissioner determination) uses "discharger" where other parts use "person." Discharge" and "loading" seem to be used interchangeably while the standard itself is focused on loading.]

7. Confusing and internally inconsistent demonstration requirements

a) basic information to be provided for all antidegradation reviews

327 IAC 2-1.3-5(a)

This is for any person with new or increased loading that would cause significant lowering of water quality note exempted. That language correctly mirrors the standard being implemented.

However subsection a) shifts from "loading" as the event regulated to "discharge." The remaining implementation subsections return to "loading" except where from the context on f the sentence it is a facility adding material through a pipe.

However, the only exemption for significant lowering are nonBCC NPDES permit limited substances. Therefore, many substances posing negligible impacts but yet present in amounts above "zero" are incorporated in the information reporting requirements.

i) **therefore naming the proposed regulated pollutants proposed to be "discharged" is a huge policy challenge – is it intended to be substances of consequence or to be all regulated pollutants present regardless of the quantity or concentration?**

- *regulated pollutants with new or increased permit limit – this application is straight-forward*
- *regulated pollutants in point source discharge without Reasonable Potential to Exceed – is there intended to be a limit of detection de minimis or is presence assumed unless good evidence otherwise of absence – depending on meaning of "developed pursuant to" this list is either long or very long*

- *regulated pollutant in nonpoint source – what is meant to be listed for natural and human contributed storm water runoff from agricultural and other property – to what level of detection is IDEM interested for the list? – this is very long list of potential substances at inconsequential concentrations depending on storm event – this should be targeted to substances of concern*

- *regulated pollutant in wetland filling – makes no sense to list chloride and all other natural chemicals in soil that is being put into water about to be fill with soil- the focus should be on permanent adjustment to water quality for significant pollutants in situation, not listing trace "regulated pollutants"*

- *regulated pollutants in stream bank cutting – this is similar issue to wetland – the focus should be on serious long-term lowering*

- *regulated pollutant in harbor dredging – here understanding chemical quality of sediments that could be stirred up is important – how does antidegradation add to what is done in permit process itself?*

ii) concentration and mass loading of "all regulated pollutants"

For point source NPDES regulated pollutants with new or increased permit limits this is an answerable question. The party could describe roughly the range of discharge possible depending on time of year and circumstances of the purpose for the operation. Hence a maximum effluent flow and

load could be established and a permit limit for a theoretical single situation be developed. Hence there can be an estimated "actual" together with a specific "permitted" load. It is the permitted load that the antidegradation de minimis determination was based on.

For point source regulated pollutants without permit limits and zero de minimis these estimation of range of projected actual "concentration and mass loading" is much more difficult.

For nonpoint source regulated pollutants, I have no idea scientifically how to begin to guess the trace, insignificant substances naturally present with a load increase just because water flow is increasing. Even for human added substances, the calculations would vary from year to year, acre to acre and be dependent on weather conditions.

For wetland filling and stream bank cutting, conceptually I cannot grasp what is expected.

***iii) Map of "discharge"** – this is reasonable*

iv) Condition of receiving water

This is "available information" plus information requested by IDEM. In theory, this is a practical requirement. Although it is easy to see how it could be abused by a government agency that does not want a particular discharge but does not want to make a determination to do that.

As written, this is the general condition but not the condition of the water as related to the regulated pollutants proposed to be increased. For practical reasons, this is probably the best that can be done. However if the purpose of the exercise is to estimate and reduce the impact on the water of a "regulated pollutant" in some way independent of all other factors, then it is unusual that the existing condition is not evaluated. It overcoming technical difficulties as would be posed by a study of existing conditions related to a regulated pollutants that the NPDES permit system is written the way it is.

b) *"beneficial activities" 327 IAC 2-1.3-5(b) and (c)*

Subsections (b) and (d) list information requirements for activities labeled as "beneficial activities." These activities are exempt from the requirement to submit information listed in subsection (g) for a social/economic determination. The implication evidently is that by labeling the activities as "beneficial activities," the Board has made the determination that these activities meet the USEPA requirement for accommodating important social or economic development in the area. I

consider it wise that categories of activities could be considered inherently as always accommodating important social or economic development in the area wherever the loading occurs. However, as written it seems that a party could later challenge that the Commissioner did not make that case with correct information. A way to avoid this is simply to declare in the regulation that the designated activities are exempt from supplying subsection (g) information they do accommodate important social or economic development in the area of the loading.

Simply being a "beneficial activity" per se is not the quality that meets that antidegradation decision criteria.

I would also suggest that section 6(a) which describes how the commissioner makes the "accommodates important social or economic development in the area" determination be expanded to include explicitly the point that a "beneficial activity list in subsection b and d" is "may" consideration for the commissioner, a "must" consider or a "must" approve, depending on what is intended.

c) Inconsistent and redundant requests for technical demonstrations

327 IAC 2-1.3-5(c) and (e)

Some "beneficial activities" (327 IAC 2-1.3-5(b)) need only provide subsection (c) information but not subsection (e). Other beneficial activities(327 IAC 2-1.3-5(d)) and all other activities causing a new or increased loading that is permanent and will cause a significant lowering of water quality must do both.

i) Subsection (e) Information

This subsection is the critical part of the regulation where information about the particular technology will be used to reduce the "significant lowering of water quality." A person is required here to declare a selection of either 1) "Best Available Demonstrated Control Technology" (BADCT) that has already been established by IDEM for that type of loading or 2) "alternative or enhanced treatment standards."

[It must be emphasized that this key component of the demonstration is written exclusively in language of the NPDES permit system. BADCT is defined as a "technology-based effluent limit" and around "wastewater treatment." These terms make no sense for storm water loadings, wetland filling, stream bank cutting and harbor dredging or any situation other than a point source discharge. Similarly "alternative or enhanced treatment techniques" implies treating a point source effluent. There is do direction in subsection e of what is expected as demonstration

information about what actions to take for other than the NPDES Permit Limit increase.]

BADCT makes sense in theory (if the definition is change restricting its use to sewage) but the logistics of IDEM developing and maintaining in advance of any request for an increase, an up-to-date list of all BADCTs for each type of discharge situation makes this promised option seem impractical. The closest analogy is the BACT system in air which has a narrow focus on several pollutants and a large federal and private sector infrastructure assessing developing treatment technologies.

As for "alternative or enhanced treatment techniques," it is not clear from the regulatory language how this differs from subsection c information. There needs to be an unambiguous connection between "e" and "c" – Subsection "c" should evaluate measures to reduce loading according a set of criteria that are identical to what sub section "e" uses to justify selection of an alternative strategy to the proposed permit limit.

The unstated assumption in subsection (e) is that there is an operational setup preferred by the discharger with a proposed new or increased NPDES permit limit increase that complies with the Clean Water Act and state law. The sole focus of (e) is about whether the effluent from that operational system can be treated by a different "technique" than what is proposed or if the treatment technique proposed can be "enhanced" for greater removal of the particular substance. This differs from subsection (c) information in that subsection (c) mentions effluent treatment techniques only indirectly but instead devotes primary attention to pollution prevention (in other words change the process causing the increase in effluent loading to reduce the use of the substance itself).

If this subsection intended to match 327 IAC 1-1.3-1(b) for situations other than NPDES permit limits, then it must be expanded accordingly.

The information to be provided in subsection (e) is

1) *which alternative or enhanced techniques from what would have otherwise worked are now being proposed*

2) *how were those techniques selected*

this provision overlaps greatly with first part of subsection (c); no pollution prevention is to be considered here because this provision of reasons for selection of a P2 approach is addressed explicitly in subsection (c); apparently this section is only to be used if an effluent treatment technique is changed.

is it assumed that treatment techniques will not be evaluated in subsection (c) or is the written evaluation intended to be the same in both sections of the demonstration?
(presumably this involves establishing a list of criteria for technique evaluation and how the selected techniques and the rejected techniques scored against those criteria; the subsection gives no suggested criteria; subsections (c) and (e) should be coordinated)

3) *the reliability of the techniques selected; extent increased "degradation" from other substances as a result*

(it is not clear why this decision criteria would not be applied to all techniques evaluated but only to the one "selected." Newer techniques will usually be deficient in long-term, real-world reliability experience for the situations to be applied. It is not clear reliability is mentioned by itself and not also "availability," "cost-effectiveness" and "technical feasibility" that are already analyzed in subsection (c) along with "reliability")

Note that if it is a physical treatment technique for an NPDES permit limit substances or if it is a pollution prevention substitute substance, it is virtually certain there will be an increase of another constituent, albeit below concentrations needing a permit limit itself. Since the de minimis for such increases is "zero," there almost always be that "increased degradation" when reducing load of a substance. Including this observation in the analysis is good policy; requiring that such minimal degradation to itself undergo an antidegradation review process as the rule sets up now would be poor policy.

Missing are the criteria discussing the costs and the benefits of the reduction of impact of the loading on the receiving water itself.

[exempt from the subsection (e) requirements for alternative or enhanced treatment evaluation are the following "beneficial activities:" 327 IAC 2-1.3-5(b)

1) change in loading of regulated pollutant due solely either to enforceable municipal or industrial wet weather controls
OR to an individual NPDES storm water permit resulting in no net increase in "quantity and concentration" in 10-digit watershed [seems to imply no net increase at the downstream drain point of watershed, not that is unstated]

2) new or increased load because of CERCLA, RCRA, UST, Petroleum Release, Voluntary Remedial Action or any IDEM-approved correction of any polluted situation

3) new or increased discharge of noncontact cooling water

provided there is a WQBEL, no increase in BCC, no increase of temperature outside a mixing zone (because mercury is in all water and is a BCC, this exemption from the subsection (e) and (g) would not apply for mercury if approved with additional water in discharge; it also would not apply for any other increased trace "regulated pollutant" is at concentration below RPE so not need WQBEL.)

4) new or increased loading of approved nonBCC water treatment additive

5) change in loading of regulated pollutant where there is simultaneous enforceable decrease in the "actual" loading of the regulated pollutant from sources contributing the same regulated pollutant somewhere else in the 10-digit watershed. (It is not clear what an enforceable decrease in "actual" loading over what time period means given that the NPDES permit is an enforceable control on a theoretical daily maximum. Applying a 10-digit watershed means there could be long distance between the increase and decrease. This trade-off is stated differently than a similar 10-digit watershed trade-off at 327 IAC 2-1.3-5(b)(1)(B) so it is not clear what is meant for acceptable off-set by either.)

6) new or increased loading of a regulated pollutant from a sanitary wastewater treatment plant constructed to alleviate a public health concern, such as removing septic systems]

ii) Subsection (c) Information

Overlooking the redundancies between subsection (c) and subsection (e), this subsection (c) that almost all parties with new or increased load must comply with needs much more explanation to be implemented fairly and effectively.

One serious defect in the subsection (c) component is a missing factor for evaluating the relative value of options. When evaluating ways to reduce impact of increased loading a critical factor of evaluation is the context of the nature and degree of the impact of the loading on the receiving body. What are cost-benefits of that? The sole analysis is of the options themselves. That is fine but not complete.

The second defect is the absence of an indication about how much information of what quality is enough. Is a small loading by a small farmer expected to have the same quality of analysis as a major new power plant?

The structure itself has internal overlaps. If no degradation and minimal degradation (5(c)(1)(A) and (B)) are to include all ways to reduce the loading, there is no reason to continue with subsequent requests for the same information (5(c)(1)(C) and 5(c)2(A)).

On the other hand if all degradation mitigation techniques and alternatives "<u>including</u>" the 5(c)(2) list are to be done, ther is no reason to

do a "no degradation" and "minimal degradation" techniques and alternatives.

It is clear what is being requested but it should be rewritten in orderly and clear manner so the party and agency have the same understanding of scope expected for each aspect without redundancy among the requests.

The information to be provided in subsection ~~(e)~~ (C) is

***1A Availability, reliability and cost-effectiveness and technical feasibility* of "no degradation" 327 IAC 2-1.3-5(c)(1)(A)**

for new or increased NPDES permit limit of nonBCC, this means less than the de minimis established as "significant lowering of water quality"
for all other situations addressed in this proposed implementation rule, this means no increase larger than "zero"
(for the NPDES permit limit, this could be a back-of-envelope paragraph or a PhD thesis)

1B Availability, reliability and cost-effectiveness and technical feasibility of "minimal degradation" 327 IAC 2-1.3-5(c)(1)(B)

for new or increased NPDES permit limit of nonBCC, this evidently means greater than the de minimis established as "significant lowering of water quality" but less than allowed for the permit limit by BAT and water quality-based-effluent limits.
for all other situations addressed in this proposed implementation rule, this means increase larger than "zero" but less than whatever would otherwise be legal to do.

1C Availability, reliability and cost-effectiveness and technical feasibility of "degradation mitigation techniques or alternatives"

327 IAC 2-1.3-5(c)(1)(C)

(evidently this is intended to be a catchall in the same way that the first two analyses have no constraints on the measures to be taken to lowering the loading or the impact of the loading; it is not clear what the universe of such measures would be beyond what was analyzed for "no degradation" and analyzed again for "minimal degradation."

The only way this third phrase makes sense is to assume that that really what it means is for a discharger to provide the specific information in A, B, C below and not to repeat the thorough written analysis of all options under minimal degradation and no

degradation. And the only way the three conditions make sense is if they are NPDES permit situations.

If that is the case, the three specific additional analyses are:

2A Pollution Prevention Alternatives

327 IAC 2-1.3-5(c)(2)(A)

Although it is not explained clearly in the regulation, this analysis does not address any effluent treatment technique. Pollution prevention as defined by state law IC 13-11-2-166 and by the definition in this rule is solely about source reduction in industrial processes.
Can you change your industrial process to have no or less load of a particular substance?
This federal concept is applied to industrial point source dischargers. Note that the primary purpose of this 1990 federal law is to avoid industrial shifting pollutants or environmental impacts among water, air and land as is required by the various environmental laws, each addressing single environmental medium. For instance, removing sulfur dioxide from coal combustion creates much more carbon dioxide emissions and sludge to be disposed of on land.

2B Connection to an external treatment works

327 IAC 2-1.3-5(c)(2)(B)

Is it possible to have another party treat your effluent? This seems to be a yes or no question, without regard for the impact on the environment project, the capital and operating costs or even whether it would result in a lower loading than if you were to treat the effluent yourself.

2C For a POTW, with an increase from an indirect discharger, the discharger must perform a complete pollution prevention analysis for the substance to be increased and report CSO outfalls between indirect discharger and the POTW.

327 IAC 2-1.3-5(c)(2)(C)

The trigger is whether "the proposed significant lowering of water quality" is from an indirect discharger.

- *If the increased loading of the substance requires an increased NPDES permit limit for*

the POTW, then the "significant lowering" is determined by the regulation based on the available loading capacity for the POTW and substance.

- *If the increase of a particular substance by the indirect discharger does not require an increase of that substance's limit to the POTW NPDES permit, the regulation is clear at 327 IAC 2-1.3-4(c)(2) that no antidegradation review is needed for substances covered by permit limits. The assumption is that the calculations allow for variations in concentrations over the course of the month and year provided they stay within permit conditions.*

- *However, increases by an indirect discharger for substances where the POTW is not required to have an NPDES permit limit have no de minimis. All such increases from the POTW require a complete antidegradation review and, in this subsection, all such increases require indirect discharger to perform a pollution prevention analysis.*

According to 327 IAC 2-1.3-1(b), the implementation procedures written apply not just to NPDES permit limited substances but to any situation with an increase.

According to 327 IAC 2-1.3-3. any significant lowering of water quality requires and antidegradation review.

According to 327 IAC 2-1.3-4(c), there is no de minimis for a situation other than for a substance from a point source that has an NPDES permit limit. Most "regulated pollutants" (according to the new definition of the proposed rule) that are in an average indirect discharger's discharge and in a an average POTW NPDES permitted discharge do not require an NPDES permit limit. All of these substances will have "zero" as a significant lowering of water quality threshold for the new antidegradation review.

The regulatory procedures are silent on when and how to address these but according to the proposed regulation there can be no increase of a substance without a permit limit above what would be its existing effluent quality without an antidegradation review. Since increases and decreases

of such trace substances occur regularly without measurement, the notion of "existing effluent quality" must be placed into regulatory language in practical terms if the regulation is to be adopted with this new concept. There must be measurement requirements and a variability accounted for so that at least the increase is a real increase of significance.

Performing a pollution prevention analysis on discharges in quantities too small to require a permit limit is something that should carefully considered. It probably should be restricted to be performed only at the time of the five-year permit renewal where all pretreatment is considered. If the substances that trigger the "above zero" trigger are in the intake water from ground water or public water supply, that should be excluded from an automatic pollution prevention analysis but should be its own targeted analysis depending on the situation. Mercury and endocrine hormone disruptors in intake water, for instance, usually are outside the pollution prevention focus of encouraging industry to rethink what they add as chemical components of their processes. And certainly other commercial indirect dischargers are ill-equipped to perform pollution prevention analyses on the intake water. IDEM's fiscal analysis did not include such a number of antidegradation reviews or of regular pollution prevention analyses.

3 Evaluation of Possibility of New Regional Sewage Facilities

327 IAC 2-1.3-5(c)(3)

Every NPDES permit holder and every other person triggering the new antidegradation must include in the antidegradation information an analysis of "availability, cost-effectiveness and technical feasibility" of "central or regional sewage collection" Including those in government planning documents.

This makes no sense for everyone to perform at each antidegradation review.
Is every POTW to pay for an assessment of regional sewers each time they proposed an increase? Is every power plant discharging to a river to perform this analysis for the area some distance from the plant? Is every storm water runoff property owner? Indirect discharger to a POTW? Filling wetland? Cutting stream bank?

This requirement should be restricted to those situations where IDEM has identified that a regional sewage treatment capability is missing and could be useful and to those parties who could be in a position to implement it (e.g. local government units).

4 Evaluate of Possibility of Alternative Point for "Discharging"

327 IAC 2-1.3-5(c)(4)

- *NPDES Permit Dischargers*

For NPDES permit dischargers, it is clear that a study must be performed of the "availability, cost-effectiveness and technical feasibility" of discharging to another water body with "higher assimilative capacity for the regulated pollutant" and that is not an OSRW.

Clarification needed in the regulation:

- ***"water body"***

The definition of water body for this purpose is critical. Is this intended to be moving water out of a 10-digit watershed to a second watershed? Or is it feasibility of discharging 100 yards downstream? How many options and how far are away are options to be considered?

change "shall" to "may at discretion of IDEM"

At one level, if it is feasible when constructing a new facility to would be good to consider a new facility location, new piping or new ditch to move the effluent to avoid a small stream or a vulnerable stream. On the other hand, it is much less possible for existing facilities with large capital investments in a particular location, such as a sewage treatment plant sited decades ago using gravity to reduce energy costs.

Wielding water from one water body to another on a large scale may have negative consequences for the aquatic community or aquatic recharge potential in the first "water body."

I would make this a "may" provision for existing dischargers. The commissioner may request this study after a written determination that such a study could be protective. I would also include in the study the potential of negative environmental or energy consequences. To perform this for every antidegradation request is enormous waste of effort and unnecessary potential for conflict.

- NonNPDES Permit Dischargers

For antidegradation by nonNPDES permit dischargers, understanding what this regulation means is more complex.

An argument could be made that this provision does not apply to nonpoint source dischargers. This argument is that because term "discharge of a pollutant" (327 IAC 5-1.5-11) means addition of any pollutant from a point source in Indiana therefore the "discharge" provision in the proposed subsection (c)(4) also refers to only to point source discharges.

If that is the case, antidegradation review is required for any increase in a permit limit constituent that is above de minimis lowering of water quality or any increase above "zero" for a constituent in a point source that has no limit.

The counterargument is that because the proposed regulation is changing water definitions for Article 2 in a manner inconsistent with Article 5, that Article 5 regulation about NPDES permits does not apply to this provision.

With this logic, while in Article 5 "discharge" is defined as "a discharge of a pollutant" and "discharge of a pollutant" is an addition from a point source (327 IAC 5-1.5-10 and 11), in Article 2 "discharge" is defined as "discharge of a regulated pollutant" without further modification saying it is a point source. The argument further assumes that the Board must mean something different between "pollutant" of Article 5 and "regulated pollutant" of Article 2 or it would not have introduced this new concept for antidegradation.

Therefore, this requirement to evaluate alternate discharge location applies to any increase in loading, whether a point source or not. There is no de minimis for nonpoint sources in this proposed regulation.

Presumably, while "assimilative capacity" is measured at stream design flow for NPDES permit limited constituents, it is measured by total flow at different flows for storm water runoff situations. (Note that a more practical and meaningful way to address the most significant of the

constituents in storm water (nutrients) is to have the policy be terms of annual load instead of assimilative capacity in daily flow.)

A study to divert water flow from a nonpoint source is highly problematic. Is it expected that the water is to be collected in order to be diverted to a new water body? What is a water body in terms of nonpoint source that is running off at many diverse locations?

[Mercury and Section 5

As a ubiquitous element in all surface and ground water with no de minimis for any increase, an antidegradation review will be required for any point or nonpoint source increase in water added to a federal jurisdictional surface water.

Therefore this provision to explore putting the water into another water body will be triggered regularly. That means a standard Section 5 policy will need to be developed about what is higher and lower assimilative capacity for trace mercury between water bodies and how is that to be measured.

[BCC demonstration missing from Section 5

A serious deficiency in Section 5 is that there is no explicit requirement to study the feasibility of substituting a nonBCC for a BCC. The core provision of the federal Great Lakes Initiative is for such a study. GLI targeted its policy toward the industries that would introduce new chemicals in their operation that would have DDT-like and PCB-like. The corresponding federal regulation for the Great Lakes Basin said that if you proposed to do this, the discharger must do a study to determine what it would take to replace the BCC with a nonBCC. This proposed regulation eliminates the prohibition of any increase discharge of BCC to the Great Lakes Basin for waters other than OSRW and eliminates the prohibition of discharge into the Great Lakes Basin OSRW for mercury. The existing regulation did not need the provision to substitute BCC with nonBCC because of the prohibition; remove the prohibition and the substitution study must be added. The provisions in subsection (c) allow for a discharger to evaluate change to nonBCC but neither require it nor give credit for such a review.

A fix can easily be added to the pollution prevention requirement in subsection (c), but for the fact that subsection (b) activities are not required to do subsection (c)]

Subsection (g) – Social/Economic Test

I am not commenting on subsection (g) because the language is that which IDEM requested the General Assembly to adopt. Thus it is in statute. The information requests have redundancies and ambiguities. The regulation does not give any indication about the nature and extent of information expected for any particular topic listed. Nor does it say how the information will be evaluated. Therefore this half of the antidegradation demonstration test is completely at discretion of commissioner to favor one party and not another.

8. **"High quality water" definition is critical to implementation of the 1.3 antidegradation standard**

327 IAC 2-1.3-2~~(24)~~ (25)

The proposed high quality water definition (327 IAC 2-1.3-2 (24)) to be used for permit calculation, antidegradation standard and antidegradation implementation procedures, must be modified to be broader and more practical.

The proposed definition is a hybrid of two competing ways to considered impaired waters: overall quality or parameter-specific quality. As a patched together hybrid definition it is not correct for either. Indiana has selected an EPA-approved parameter-specific measure of high quality because that was the most practical approach for assigning NPDES permit limits to protect water quality. The permit limit is a numeric value for one parameter that the government considers protective of a water body and for which the government can measurement compliance. That parameter-specific approach is related to but not the same as overall quality. It is possible to have a water body meet the overall measure of high water quality (e.g. fish and shellfish propagation or recreation) without achieving a particular parameter-specific quality. The inverse is true as well.

In a parameter-specific approach, the characteristic of "high quality" is a condition of the water for a single parameter, it is not a characteristic of the water body as a whole.

If a water is achieving the water quality standard for a particular parameter , then the water is considered to be "high quality water" <u>for that parameter</u> . It is not, as the proposed definition says in its final sentence, automatically a "high quality water" inherently for the water body or for any other parameter. It could be an obviously, seriously impaired water. But regardless, for that single parameter the water quality is "high quality water" and antidegradation Tier 2 standard applies to that parameter if a loading is proposed that would significantly lower the water quality <u>for that parameter for that water quality standard</u> .

A second point is the use of the phrase "water quality criterion" in the final sentence of the definition of high quality water. The condition that determines the high quality water in the parameter-specific approach is not the criterion but the standard. Each water body has a controlling criterion for each parameter based on the designated uses for the water body. The controlling criterion is the water quality standard. That is the

criterion that must be achieved to attain status of high quality water for the parameter.

The "nontransient aquatic organism" is a useful research tool to provide indication about overall water quality but due to logistic reasons, that is not a suitable measure to provide a clear quantitative basis to calculate an unambiguous numeric NPDES permit limit. There are many unresolved technical policy issues: what is the "detection" limit of the analytical procedure to declare a particular trace concentration of a parameter in an organism above a level of confidence to be real enough to declare the water body as not a Tier 2 high quality water for purpose of antidegradation? How nontransient is nontransient? How deep in the sediment? For a sensitive-enough technique "detection" is possible for all naturally present substances. The policy as written makes this an impaired water (Tier I) to which is not allowed any "significant lowering of water quality" regardless of an antidegradation review? (Note that the nontransient phrase is incorrectly connected to sentence. As written the meaning is if a substance is not detected in nontransient aquatic organisms at some level it the water body is high quality. That is not true. The water column may exceed the standard for a particular parameter without detection in an organism. No organisms sampled automatically means no detect and, according to this definition, automatically high quality water.)

The current water quality standards, for better or worse, address only water column components. There are many other related water quality issues such as sediment quality (which Indiana has not yet considered important enough to develop and maintain a serious monitoring program for. The concept of "BCC" was an attempt by USEPA to address the issue of long-term toxicity to a situation it said was unique to Great Lakes Basin that was not addressed in the short-term water quality-based policy of the standard system.

Any further sophistication to the system such as addressing harmful loading of persistent compounds that do not bioaccummulate must be accomplished by establishing a scientifically-sound, practical implantation procedure with an appropriate controlling document and enforcement procedure.

Dropping the idea of concentration of chemicals in different organisms into the pollutant-specific approach for the mathematical system developed for the consistent assignment of an NPDES permit limit prevents the delicate NPDES permit system from doing its function.

*If the first part of the definition is needed for federal reasons, would suggest the final sentence be rewritten to say something like: "**A water body that has a concentration of a pollutant attaining the water quality standard established for that pollutant in that water body is considered to be a water body of high quality water for that pollutant for the purpose of this rule.**"*

(In the Indiana approach, "high quality" is the condition of a water that is achieving a water quality standard for a particular parameter. Antidegradation demonstration is required for any significant lowering within the water condition of achieving the standard for that parameter. Period. Talking about it as a water body can result in awkward and incorrect definitions. Tier 1, in our approach, is also about the condition of the water. It is the inverse of Tier 2. Where a standard for a particular parameter is not being met, the water condition is "impaired" for that parameter. "Tier 2.9 and Tier 3" are completely different ideas; those indeed are actual bodies of water with physical boundaries assigned by law independent of water quality.

The proposed regulation has this idea stated perfectly correctly and simply at 327 IAC 2-.3-3(b)(1) where it establishes the antidegradation standard. All implementation text should be written directly off this concept.)

December 23, 2011

LSA Document #08-764 (Antidegradation)
Mary Ann Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Ave.
Indianapolis, IN 46204-2251
Proposed Antidegradation Rule as Preliminarily Adopted

RE: Indiana Pork Advocacy Coalition/Indiana Farm Bureau Comments on Proposed Antidegradation Rule as Preliminarily Adopted

Indiana Farm Bureau, Inc. and the Indiana Pork Advocacy Coalition appreciate the opportunity to once again express our thoughts and concerns on this proposed rulemaking regarding antidegradation. On behalf of our members, we appreciate the efforts which IDEM has undertaken to address concerns which have been previously raised. While the comments submitted by our organizations to the Water Pollution Control Board on July 27th, 2011 are a more complete account of our concerns, we wish to use this opportunity to reiterate a few major areas where this proposed rule should be improved.

The agency's responses to several of these concerns in the past have indicated that IDEM's interpretation of the proposed rule aligns with our understanding of how antidegradation standards should be implemented according to the Clean Water Act (CWA). However, we are basing this on the agency's interpretations as seen in its responses to our comments, not in the text of the actual rule. The vast majority of our concerns would be eliminated if the rule language was modified to reflect the interpretation of IDEM. The regulated community must be able to rely on the actual text of the rule as that will remain constant while interpretations of an unclear rule could vary over time. Further, the likelihood of ongoing litigation created by unclear rule language is even more concerning than the threat of varying interpretations in the future.

With respect to the applicability section in 327 IAC 2-1.3-1, we remain concerned that some may try to read this language more broadly than it is intended by IDEM. In response to our comments from the second comment period, it was noted that the antidegradation rule only applies to activities regulated by the CWA and the state and federal rules which implement the CWA. Thus, it was stated that this rule does not apply to nonpoint source activities which are exempt from CWA regulation. We agree that this is an appropriate interpretation of the law. However, many activities may be subject to the CWA which are exempt by the terms of the CWA. We believe it is more appropriate that 327 IAC 2-1.3-1 (b) state:

"...deliberate activity subject to an NPDES permit under the Clean Water Act..."

This language more clearly indicates the intent of the agency as explained in the response to comments from the second comment period.

Also in the second response to comments, IDEM has addressed our concern regarding non-discharging facilities with an NPDES permit by saying "[i]f a CAFO general permit does not allow for a discharge, then the CAFO general permit does meet the non-degradation standard." Again, we agree with this interpretation, assuming that this same analysis extends beyond the soon to be defunct CAFO general permit to include individual NPDES

permits for CAFOs as well. Our issue is that this interpretation for non-dischargers seems contradictory with respect to the references to nonpoint sources in the proposed rule. If the absence of a discharge requiring a NPDES permit automatically meets the non-degradation standard, there is no need to mention nonpoint sources in the rule. Not only does the reference appear to run counter to IDEM's interpretation, it is questionable how nonpoint sources could be regulated under this rule based upon the lack of CWA authority.

This discrepancy is most notable at 2-1.3-3(a)(1)(B) where establishing "controls as necessary on nonpoint sources..." is discussed. If it is the agency's position that this rule does not apply to nonpoint source activities exempt from CWA regulation, this rule should not reference establishing controls on nonpoint sources. This is not to say that our members do not believe that limiting pollution from nonpoint sources is not an important tool in protecting the environment. However, it does mean that existing authorities must be followed and that efforts outside of controls on point sources should not be a part of this rule. Nonetheless, responses to nonpoint sources of pollution must be considered and coordinated within IDEM with respect to the appropriate programs and regulatory authority. To clarify the agency's intent and to be consistent with the authority which exists under the CWA, the language in 2-1.3-3(a)(1)(B) referencing controls on nonpoint sources should be removed.

We are also concerned about specific mentions of nitrogen and phosphorus as regulated pollutants in 327 IAC 2-1.3-2(44)(A)(ii)(BB) when they would already be covered in the narrative criteria category listed in (44)(A)(ii)(AA). It would seem unnecessary to single out certain pollutants. We recognize and agree that nitrogen and phosphorus could be subject to an antidegradation review. However, focusing attention on nitrogen and phosphorus with rule language when numerous comments have been made alleging that IDEM was essentially ignoring those nutrients does nothing but set unreasonable expectations. The antidegradation review will be limited with respect to nitrogen and phosphorus. The actions which can be required under the antidegradation rule are limited as noted above when addressing nonpoint sources of pollution.

Overall, we are pleased that some changes have been made to this proposed rule. Nonetheless, we remain concerned that the rule is largely unworkable as written. While relatively few agricultural activities are subject to this rule, those that are should have little concern with not being able to show that they will have little or no impact on water quality. That does not change that it will likely be confusing and difficult to make the required showings under this rule.

We thank IDEM and the Water Pollution Control Board for considering these comments. Questions with respect to these comments can be submitted to the undersigned.

Respectfully submitted,

Joshua D. Trenary
Director of Business Development
Indiana Pork Advocacy Coalition

Justin T. Schneider
Staff Attorney
Indiana Farm Bureau, Inc.

Indiana Steel
Environmental
Group

9305 Calumet Avenue, Suite F-1
Munster, Indiana 46321
Tel: 219-836-1000
Fax: 219-836-4100

OFFICIAL COMMENT

CERTIFIED MAIL – 7008 1300 0000 8348 2750

December 29, 2011

Mary Ann Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Avenue
Mail Code 65-45
Indianapolis, Indiana 46204-2251

Subject: LSA Document #08-764 – Notice of Comment Period
Development of New Rules and Amendments to Rules Concerning
Antidegradation Standards and Implementation Procedures

Dear Ms. Stevens:

I am writing this letter on behalf of the Indiana Steel Environmental Group (ISEG) to provide comments on LSA #08-764, Development of New Rules and Amendments to Rules Concerning Antidegradation Standards and Implementation Procedures.

The Indiana Steel Environmental Group is a coalition of Indiana steel companies established to focus on environmental matters of concern to its members. The Indiana Steel Environmental Group (ISEG) consists of membership from ArcelorMittal USA, ArcelorMittal Indiana Harbor Inc., United States Steel Gary Works, United States Steel Midwest Plant, United States Steel East Chicago Tin Operations, I/N Tek, I/N Kote, ArcelorMittal Burns Harbor LLC, and Nucor Steel Crawfordsville.

The Indiana Steel Environmental Group's primary concern regarding antidegradation continues to relate to the practical impacts of implementation. If not properly implemented, the program could place severe limitations on important social and economic development and economic progress for the affected communities, without resulting in any significant benefit to water quality. This could seriously impede attempts to revitalize impoverished communities through Brownfield redevelopment and could compromise the competitiveness of existing industries by limiting their ability to expand operations or change technologies.

The preliminarily adopted rule has several major issues that need to be addressed before final adoption.

1. Section 1(b) of the proposed rule is much too broad and vague than the legislature intended when it passed Indiana Code 13-18-3-2(k) & (l) and is likely to lead to mis-interpretations of rule applicability in the future. The applicability provision should be

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limited to only those instances where there is a new or increased loading of a regulated pollutant for which a new or increased permit limit is required.

2. The definition of "Significant lowering of water quality" in the proposed rule is inconsistent with the requirements in Indiana Code 13-18-3-2(l)(1)(A) which limits antidegradation review to new or increased loadings "for which a new or increased permit limit is required."

3. The draft rule includes a concept of a "benchmark available loading capacity" that is much more stringent than what is required by Indiana Code 13-18-3-2 and federal regulation. USEPA has approved other State's regulations with no such cap and we encourage IDEM to either remove or revise the rule to include a reasonable benchmark loading capacity to ensure that *de minimis* permitted increases do not reduce the unused loading capacity.

4. At Section 4(c)(1)(A)(ii) and (iii), the rule implies that the benchmark loading capacity as calculated during the initial request will remain indefinitely. There is no reason to maintain the initial benchmark loading capacity and ignore changes that may occur to the stream that increase unused loading capacity. If a discharge is eliminated or reduced upstream there will be a greater assimilative loading capacity downstream. If the concept of a benchmark loading capacity remains in the rule it must be revised to allow the benchmark loading capacity to be re-calculated if conditions in the water body change.

5. The concept of a water quality improvement project in Section 7 of the proposed rule is contrary to the clear intent of IC 13-18-3-2(k) and (l). The clear intent of the statutory language has always been that the performance or funding of a water quality improvement project will be the primary basis of gaining approval for the increased loading by a discharger to an OSRW. As written, the proposed Section 7 requires the water quality improvement project be performed or funded in addition to an antidegradation demonstration.

   Section 5 of the proposed rule does not clearly implement the understanding referenced above and could leave a discharger proposing a water improvement project and an obligation to prepare a full antidegradation demonstration. To address this, Section 5(b) should be modified to expressly provide that a project involving payment of a water improvement fee is included within subsection 5(b). With these revisions, a proposed increase in loading to an OSRW involving a water improvement project implementation or fee payment will satisfy the antidegradation demonstration requirements with submittal of the basic information of Section 5(a) and the "necessary" information of Section 5(c).

The Indiana Steel Environmental Group believes that the final antidegradation standard and implementation procedures should be designed with a dual purpose of protecting Indiana's water resources while supporting the economic viability of existing industries and affected communities.

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The State of Indiana has already developed and adopted water quality standards that establish limits for which constituents can be discharged to Indiana's water resources without harm. The antidegradation standard should support these provisions.

The ISEG strongly believes that the final rule should not impose requirements on Indiana's waters that are more restrictive than neighboring Great Lakes States placing Indiana at a clear economic disadvantage.

Thank you for your consideration of these comments. If you have any questions please feel free to contact me at patrick.gorman@eptconsultants.com or phone at 219-836-1000.

Sincerely,

Patrick M. Gorman

Patrick M. Gorman, P.E.
Facilitator, Indiana Steel Environmental Group

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Taft Stettinius & Hollister LLP
One Indiana Square, Suite 3500 / Indianapolis, IN 46204-2023 / Tel: 317.713.3500 / Fax: 317.713.3699 / www.taftlaw.com
Cincinnati / Cleveland / Columbus / Dayton / Indianapolis / Northern Kentucky / Phoenix

William C. Wagner
Direct: 317.713.3614
Email: wwagner@taftlaw.com

OFFICIAL COMMENT

December 30, 2011

Via Hand-Delivery

MaryAnn Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Government Center North
100 North Senate Avenue
Indianapolis, Indiana

Subject: **LSA Document #08-764 (Antidegradation) – Comments Concerning the Antidegradation Standards and Implementation Procedures Proposed (Preliminarily Adopted) Rule published on December 7, 2011**

Dear Board Members:

On December 7, 2011, the Water Quality Control Board's (the "Board") Proposed Rule addressing "Antidegradation Standards and Implementation Procedures," LSA Document #08-764 (hereafter referred to as the "Antidegradation Rules" or "Rules") was published in the Indiana Register and was available for review at http://www.in.gov/legislative/iac/20111207-IR-327080764PRA.xml.pdf. Also on December 7, 2011, the Board published the "Fiscal Impact Statement" of the Anitdegradation Rules prepared by the Indiana Department of Environmental Management ("IDEM") and available for review at http://www.in.gov/legislative/iac/20111207-IR-327080764FIA.xml.pdf (the "FIS"). The Indiana Water Quality Coalition ("IWQC") and the Indiana Manufacturers Association ("IMA") submit the following comments regarding the Rules and the FIS.

As we have previously stated in comments to the Board, the IWQC is a group of businesses with shared interests in Indiana regulations, policies, and operating procedures concerning water quality. The IMA is a voluntary, nonprofit trade association representing nearly 2,000 companies and 600,000 manufacturing jobs.

Each of these entities has members or facilities in Indiana that will be considerably affected by the adoption of Antidegradation Rules.

The IWQC and the IMA have previously submitted written and oral comments regarding the proposed Antidegradation Rule. Most recently, these comments were submitted verbally and in writing on July 27, 2011, regarding the Draft Rule (Final Revisions) dated May 6, 2011 (hereinafter the "July Comments"). The IWQC and the IMA hereby incorporate and refer the Board to all their prior comments, including the July Comments. The IWQC's and the IMA's additional comments are provided below.

Comments

1. IDEM's Fiscal Impact Statement does not comply with Indiana's statutory requirements.

The Board may not adopt a rule until IDEM has published a copy of the fiscal analysis required under Indiana Code Section 4-22-2-28. IND. CODE § 13-14-9-5(a)(2)(C). In turn, Section 4-22-2-28 contains several requirements regarding the contents of "fiscal impact statements," two of which are particularly relevant here.

First, IDEM's fiscal impact analysis must be based on the twelve month period commencing with the date *after* the rule is fully implemented. Section 4-22-2-28 states:

> [T]he agency proposing the rule shall consider the annual economic impact on all regulated persons beginning with the first twelve (12) month period after the rule is fully implemented. The agency may use actual or forecasted data and may consider the actual and anticipated effects of inflation and deflation. The agency shall describe any assumptions made and any data used in determining the total estimated economic impact of a rule under this section.

Based on this statutory requirement, IDEM's assumption regarding the number of permit applications it may expect in 2012 is inadequate. Indeed, IDEM repeatedly relies on application data purportedly representing permits it received in **2009**. (FIS at 2 ("Based upon 2009 permit applications, there are about 80 permit applications a year that may result in a new discharge of pollutants."); 3 ("Based upon the 80 permit applications received in 2009 that might be required to consider antidegradation . . . [.]"); 6 (In 2009, Indiana issued 55 new permits . . . [and]processed 89 permit modifications[.]").) IDEM then subtracts from the total number permits those that "would not likely be subject to

anitdegradation review." (FIS at 8.)[1] IDEM did not rely on actual data. IDEM did not rely on forecasted data. And, IDEM makes no attempt to demonstrate why 2009 data reliably predicts permit applications in 2012 or in the future. In doing so, it has not complied with Section 4-22-2-28.

The IMA and the IWQC submitted comments based on a range of historic averages for permits IDEM received from 2004 to 2009. The low-end of this range was 49 permits, while the high-end was 105 permits. IMA and IWQC maintain that this range is more accurate than relying on the IDEM's 2009 data (which IDEM then arbitrarily reduced). They submit that the high-end of the range should be used for IDEM's fiscal impact analysis as it supplies the most conservative basis on which to make a regulatory determination.

Second, fiscal impact statements must consider the effect that compliance with the proposed rule will have on "the state and all persons regulated by the proposed rule." IND. CODE § 4-22-2-28(d). The IMA and IWQC read this statute to require adequate consideration of all compliance costs on all stakeholders – including the State. Inclusion of costs to the State is important. As an executive agency, all Hoosiers pay for the costs of its operations. In at least one instance, IDEM has failed to appropriately consider, and indeed has glibly set aside, potential costs to the State.

The IMA and IWQC submitted comments regarding the costs of complying with the Rules. These comments are noted in the FIS. (FIS at 3-4.) One component of these costs included a forecast that potential public notice and hearing costs could range from $720,000 to $945,000 per year. IDEM dismisses these numbers as being inconsistent with its experience and then, remarkably, goes on to imply that if the costs of participating in the public notice and hearings are too expensive for a regulated business, then that business may choose not to participate and the State will cover those costs. (FIS at 4 ("if they do not choose to engage in the process, IDEM will do it.") There is no indication in the FIS of whether IDEM has considered these additional potential costs which must be absorbed by the State. This is inconsistent with Section 4-22-2-28(d).

But, more importantly, IDEM's statement that regulated entities may "choose" not to participate in the permitting process if it becomes too expensive underscores the agency is not concerned with the potential costs of complying with the Rules. At least in part, an appropriate fiscal impact analysis must demonstrate that the true costs of a proposed rule do not exceed the regulated communities' – from small businesses to

[1] IDEM's reduction of the total number of 2009 permits by those that "would not likely be subject to antidegradation review" appears to be an arbitrary reduction made to deflate the impact of complying with its proposed rule. Either a permit is subject to antidegradation review or it isn't. IDEM has the authority to make that call and it should do so here.

large corporations – ability to economically comply with the rule or to meaningfully participate in the regulatory process. If the only way members of the regulated community can comply with a proposed rule is by avoiding the costs of meaningful participation in the process, then a proposed rule is clearly too onerous and lacks legitimacy.

2. IDEM's Fiscal Impact Statement does not adequately consider impacts on small businesses.

In addition to the comments made above, IDEM has not given sufficient consideration to the impact of the Rules on small businesses. A "small business" is defined as a business entity with less than 150 employees. IND. CODE § 5-28-2-6. Instead of determining the true number of small businesses potentially impacted by the Rules, IDEM assumed, based on 2009 permit submissions, that "all minor permits" submitted by "industries" are "associated with small businesses." (FSI at 7.) IDEM then concludes that only 14 small businesses will be impacted by the Rules. (*Id.*) First off, IDEM has again relied on 2009 data instead of a forecast of 2012. This is inappropriate. IND. CODE § 4-22-2-28. In addition, IDEM provides no rationale for its small business calculus. It is suspect to assume that only small businesses apply for minor or general permits or the small businesses do not apply for major permits. And, it is suspect to assume that only 14 small businesses in the entire State have major permits. In any event, IDEM is required to provide some explanation and it hasn't.

Moreover, even the unsupported costs IDEM calculates would be especially onerous on small businesses in today's economic climate. IDEM predicts that costs for complying with Rules on an individual small business could range from $4,000 to $16,000, while the costs on all (14) small businesses would range from $56,000 to $224,000. This is too much.

3. IDEM's Fiscal Impact Statement inappropriately relies on a fiscal analysis performed by the State of Iowa in 2008.

IDEM repeatedly refers to and relies on numbers generated by Iowa when it performed its fiscal impact analysis of its antidegradation rulemaking in 2008. (FSI at 6-9.) To rely on data from 2008, especially data from another state, does not comply with Section 4-22-2-28. Moreover, IDEM's reliance on this 2008 data from Iowa has resulted in an arbitrary fiscal impact analysis based on a low $100/hour environmental consultant fee and a $25 one-time cost for public notice.[2] A fiscal impact analysis must concern

[2] Similarly, IDEM does not provide a rationale for the range of hours it used to calculate costs. (FIS at 9.) Instead, it again wrongly relies on Iowa's 2008 fiscal impact analysis.

itself with the costs to Hoosiers in the future based on actual in-state costs. It does not concern itself with the predicted costs to Iowans in 2008 based on costs in Iowa.

4. IDEM has not considered the impact of the Rules on businesses making changes to water treatment additives.

The Board may not adopt a rule until IDEM has published a copy of a "summary of the response of the department to all comments." IND. CODE § 13-14-9-5(a)(2)(B). The IMA and IWQC presented comments regarding the costs associated with changing water treatment additives at a facility. Specifically, we estimated that changing a water treatment additive would require full antidegradation review at an annual cost ranging from $1,425,600 to $4,050,000. While IDEM acknowledged that changing additives may result in antidegradation review, it did respond to the potential cost comments the IWA and IWQC submitted. IDEM must do so before the final rule may be adopted.

Conclusion

The IWQC and IMA appreciate the opportunity to provide these comments. As demonstrated above, the Antidegradation Rules should be revised to comply with Indiana's rulemaking statutes. Incorporating the IWQC and IMA's comments and suggestions set forth above will allow the Antidegradation Rules to meet these requirements.

Sincerely,

William C. Wagner

William C. Wagner

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Taft Stettinius & Hollister LLP
One Indiana Square, Suite 3500
Indianapolis, IN 46204-2023

Via Hand-Delivery

MaryAnn Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Government Center North
100 North Senate Avenue
Indianapolis, Indiana

NIPSCO

A NiSource Company

Certified Mail# 7009 2820 0002 7733 0855
December 30, 2011

OFFICIAL COMMENT

LSA Document #08-764 (Antidegradation)
MaryAnn Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Ave.
MC 65-41
Indianapolis, Indiana 46204-2251

Re: Comments to IDEM Antidegradation Standards and Implementation Procedures Proposed Rule as Publicly Noticed on December 9, 2011

Dear Ms. Stevens:

NiSource Corporate Services on behalf of its subsidiary Northern Indiana Public Service Company ("NIPSCO") is providing comments on the above-referenced Third Notice of the proposed Antidergradation Rule (the "Proposed Rule"). NIPSCO believes the comments provide constructive ideas concerning the Proposed Rule and will help build upon the discussions between IDEM and the affected stakeholders.

NIPSCO is a gas and electric utility serving the northern third of Indiana. NIPSCO has four active electric generating stations with two sited on Lake Michigan, one on the Kankakee River, and one off of the Wabash River near Terre Haute. We have worked with the Indiana Utility Group (IUG) and the Northwest Indiana Forum in assessing the Proposed Rule and concur in the comments each of those entities has submitted.

There is one specific issue contained in the IUG comments that NIPSCO would like to expand upon because it is especially germane to our operations. This issue concerns the scope of applicability of the proposed rule (See Comprehensive Comment #1 in the IUG comment submission). NIPSCO concurs that an antidegradation review should be limited to actions requiring a new, or modified, NPDES permit subject to Section 402 of the Clean Water Act instead of any proposed deliberate activity resulting in a new or increased loading of a regulated pollutant. This clarification is necessary to ensure that the antidegradation framework is not applied inappropriately in other instances. For example, this clarification would ensure that an antidegradation framework would not be applied to groundwater migrating to surface water. NIPSCO believes that such an expansion of the antidegradation standard for groundwater discharges (not subject to an NPDES permit) is inconsistent with the intent of proposed rule. Therefore, we believe the Department should clearly define the scope of applicability for antidegradation in a manner such as posed in the IUG comments.

NIPSCO greatly appreciates the opportunity to provide these comments to IDEM and we hope that they will be helpful in the drafting of this rule. Please contact Dan Plath of my staff at (219) 647-5268 or dkplath@nisource.com if you have any questions or concerns.

Sincerely,

Nick Dernik
Manager – Environmental Policy
NiSource Environmental, Safety, and Sustainability

NORTHWEST INDIANA FORUM

6100 Southport · Portage, IN 46368 · 219.763.6303 Phone · 219.763.2653 Fax · www.nwiforum.org

December 29, 2011

OFFICIAL COMMENT

MaryAnn Stevens
Rules Development Branch
Office of Legal Counsel
Indiana Department of Environmental Management
100 North Senate Avenue
MC 65-45
Indianapolis, IN 46204-2251

RE: LSA Document #08-764 (Antidegradation)

Dear Ms. Stevens:

Thank you for the opportunity to comment on the *Development of the New Rules and Amendments to Rules Concerning Antidegradation Standards and Implementation Procedures* during the 3rd notice period. The Northwest Indiana Forum is a not-for-profit, regional economic development organization servicing members in Lake, Porter, LaPorte, Starke, Jasper and Pulaski counties. Our focus is the retention and creation of quality employment opportunities that sustain and enhance our environment and quality of life for the residents of Northwest Indiana. Protection of the environment while enhancing the region's global competitive position is the highest priority for our members.

The Northwest Indiana Forum endorses activities and rulemaking procedures that are supportive of protecting the environmental, economic and social justice components of the quality of life for our residents. In order to accomplish this, the Indiana Department of Environmental Management (IDEM) must position their regulatory processes to ensure permitting certainty. New, expanding and existing permitted facilities need to have a clear direction on what steps are necessary for them to comply with the rules and regulations of Indiana and the guarantee that technically and legally sound permits will be issued in a timely fashion. Without permitting certainty, plant expansions, new project opportunities and new jobs creation may be reduced.

In our role as an economic development organization, we strive to assist in the retention and expansion of sustainable quality jobs. Providing the Northwest Indiana workforce, including Indiana's college graduates, a broad spectrum of job opportunities and a consistently evident approach to continually improve the quality of life including a respected and protected environment are critical to the successful future of Northwest Indiana.

The following comments of support and concern have been received from the Forum membership for transmittal to IDEM:

- Antidegradation rules must be finalized in a manner that provides clear guidance on when the rules apply and what is required.

NORTHWEST INDIANA FORUM

6100 Southport · Portage, IN 46368 · 219.763.6303 Phone · 219.763.2653 Fax · www.nwiforum.org

- Public outreach and education is critical to permit issuance. To provide the citizens of Indiana the assurance of quality outreach and education, public venues whereby antidegradation is discussed should be managed in a consistent manner by the IDEM.
- Antidegradation Trigger mechanisms should be developed and implemented to only address situations when a permit application is requesting approval for a higher limit of a regulated parameter within an existing permit or a limit for a parameter new to the permit. It is imperative that Indiana be consistent with antidegradation rules previously approved by U.S. EPA to maintain national and global competition. Clarification within the rules will provide direction to permit applicants as new and/or expansion concepts are being developed.
- In instances where a permit applicant has performed a Variance Request, the rules should reflect that the Variance Request application satisfies the antidegradation demonstration requirements. Where the effect of a new or increased discharge on the environment is insignificant (i.e., is less than the de minimis threshold), there is no benefit to requiring the commitment of time and money by the public, the regulated community and government agencies. Requiring extensive review of insignificant or inconsequential discharges that clearly will remain below the water quality standards hinders industrial growth and expansion without offering any meaningful added protection to human health or the environment.
- Water quality improvement projects language needs clarification. Whereby it is appreciated that the proposed rule provides for a maximum dollar figure as a component to the guidance, it is necessary to provide further clarification to assist permittees as to the direction on how the IDEM will make a determination regarding the final cost of the required project.
- Baseline loading capacity as established in the proposed rule does not allow for IDEM to adjust this determination in response to a permanent reduction in discharges to a waterbody. The rule should be modified to grant IDEM the ability to adjust baseline loading capacity under such circumstances.

Thank you for the opportunity to provide you with our support and concern related to the proposed rule. The Northwest Indiana Forum members have appreciated the IDEM public outreach and educational efforts to date as all parties have worked diligently to finalize this issue.

Sincerely,

Kay L. Nelson

Kay L. Nelson
Director, Environmental Affairs
Northwest Indiana Forum

COPY: Mark T. Maassel, President/CEO Northwest Indiana Forum
Don Babcock, Chair, Northwest Indiana Forum Managing Board
Robert Crookston, Chair, Northwest Indiana Forum Environmental Committee